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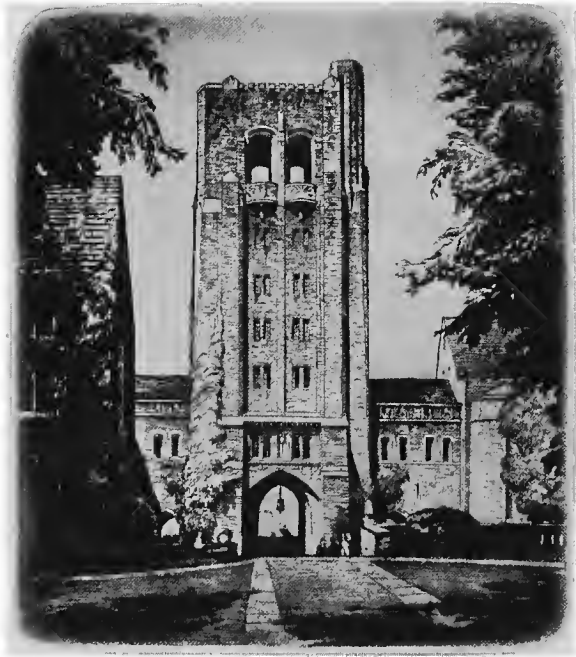
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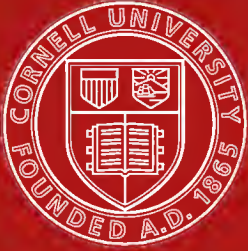
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National Biscuit Company :trade mark lit



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NATIONAL BISCUIT COMPANY

TRADE MARK LITIGATION

Opinions, Orders, Injunctions and Decrees of United States
Courts Relating to Unfair Competition and Infringement
of Trade Marks

Third Edition

43644

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Circuit Court of the United States

NORTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

ALBERT V. THOMAS AND ROBERT
D. CLARKE,
Defendants.

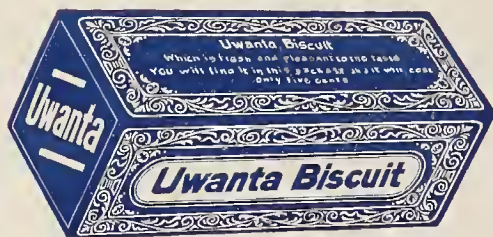
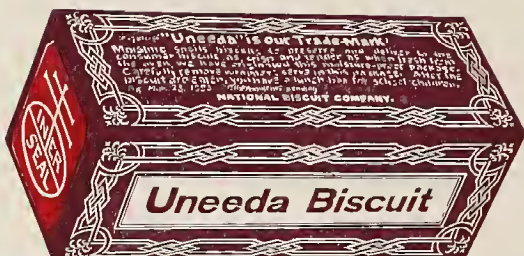
} IN EQUITY

DECREE

OFFIELD, TOWLE & LINTHICUM
CHARLES K. OFFIELD
For Complainant.

PEIRCE & FISHER
JAMES H. PEIRCE
For Defendants.

NATIONAL BISCUIT COMPANY vs. THOMAS AND CLARKE



FINAL DECREE.

UNITED STATES CIRCUIT COURT, }
 NORTHERN DISTRICT OF ILLINOIS, }
 SOUTHERN DIVISION.

Monday, April 17, 1899.

Present: Honorable Christian C. Kohlsaet, District
 Judge.

National Biscuit Company, }
 vs. }
 Albert V. Thomas and Robert D. }
 Clarke.

This day came the complainant, by Charles K. Offield, of the firm of Offield, Towle & Linthicum, its solicitors, and of counsel, and the defendants by James H. Peirce, of the firm of Messrs. Peirce & Fisher, their solicitors and of counsel, and thereupon the following proceedings were had:

This cause coming on to be heard upon final hearing, upon the pleadings and affidavits filed herein, and the respective counsel being heard for the respective parties thereon, and being duly considered, it is therefore ordered, adjudged and decreed as follows:

First: That the said word or name "Uneeda" is a good and valid Trade-mark or trade name for biscuits, crackers and other bakery products, and that the title thereof, and the entire and exclusive right in the use of the same as a Trade-mark or trade name, vest in said complainant.

Second: That the package and wrapper thereof with the border and parallelogram arrangement upon the four longitudinal sides thereof, and the printed matter in relation thereto, as shown by "Complainant's Exhibit, Complainant's Package, Trade-mark and Wrapper," are the equitable prop-

erty, wrapper and label arrangement of the complainant herein, in connection with the manufacture and sale of biscuits, crackers and other bakery products.

Third: That the defendants have infringed upon and violated the rights of the complainant by the use of the name or word "Uwanta" as a close imitation and simulation of the Trade-mark or name "Uneeda" of the complainant, and have closely imitated and simulated the package of the said complainant as to size and form, and the wrapper thereof as to arrangement of border, respective parallelograms and printed matter, in relation thereto, in the sale of the biscuits and crackers of said defendants.

Fourth: That the said defendants, Albert V. Thomas and Robert D. Clarke, and each of them, and their respective agents, servants and employes, and each of them, be and hereby are perpetually enjoined from affixing, using or causing or permitting to be used or affixed to or upon any biscuits, crackers or other bakery products or packages manufactured by them, or bought or procured or sold by them or for them or either of them, or in which they are in any manner interested, the word "Uneeda" or the word "Uwanta" or any word or synonym thereof or any word calculated to deceive or mislead, or any word colorably different therefrom, and from affixing to any package, biscuit, crackers or bakery products any wrapper, label or other covering having thereon a border and parallelogram arrangement and accompanying letters in substantial imitation of the wrapper, label and package or box arrangement of the said complainant, and only colorably different therefrom, or from using any box or package construction, wrapper or label arrangement thereof, in the sale of biscuits, crackers and other bakery products, so contrived as to lead to the belief or to be calculated to lead to the belief, or to be liable to cause the public to believe, that the biscuits or

crackers contained in such box, packages, wrappers or other covering, was manufactured or sold by the complainant.

Fifth: It further appearing to the court that the said parties have agreed to settle the question of damages to the complainant and profits to the defendants out of court, within thirty days hereafter, no reference to Master for an accounting is at this time made.

Sixth: It is further ordered, adjudged and decreed, that the defendants pay the costs herein to be taxed, and that complainant have execution therefor.

NORTHERN DISTRICT OF ILLINOIS, }
 NORTHERN DIVISION. } ss.

I, S. W. Burnham, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the Decree entered of record in said Court on the 17th day of April, A. D. 1899, in the cause wherein National Biscuit Company, is the complainant and Albert V. Thomas and Robert D. Clarke are the defendants, as the same appears from the original thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Chicago, in said District, this 18th day of April, A. D. 1899.

S. W. BURNHAM,
Clerk.



Circuit Court of the United States

SOUTHERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY
Complainant,
vs.
HENRY D. BAKER and JOHN P. BAKER,
Defendants

} IN EQUITY

OPINION AND ORDER GRANTING
INJUNCTION

OFFIELD, TOWLE & LINTHICUM
CHARLES K. OFFIELD
For Complainant.

BRIESEN & KNAUTH
ARTHUR v. BRIESEN
For Defendants.

NATIONAL BISCUIT COMPANY vs. BAKER ET AL.

(Circuit Court of the United States, Southern District New York.

June 27, 1899.)

UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

“Uneeda,” as applied to a biscuit, is a proper trade-mark; and the proprietor is entitled to an injunction against the use of “Iwanta” by another manufacturer as the name of a similar biscuit put up and sold to the trade in packages so similar as to be calculated to deceive consumers. ¹

Motion for preliminary injunction against sellers of alleged infringing goods; the action being defended by the Ward-Mackey Company, of Pittsburg, Pa., makers of the same.

Charles K. Offield, for the motion.

Arthur v. Briesen, opposed.

LACOMBE, Circuit Judge. This case is too plain to waste many words over it,—the principles of trade-mark infringement and of unfair competition have been so often discussed in this circuit. That “Uneeda,” as applied to biscuit, is a proper trade-mark, and that complainant is entitled to its exclusive use in that connection, is hardly disputed. That it has been most extensively advertised, presumably at great expense, is matter of common knowledge, and is asserted in the moving papers. Defendants present the usual voluminous bundle of affidavits by persons in the trade to the effect that in their opinion no one is likely to mistake defendants’ biscuit for complainant’s. As has been often pointed out before, it makes no difference that dealers in the article are

¹ As to what constitutes unfair competition, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and supplementary thereto, under same title, note to *Lare v. Harper*, 30 C. C. A. 376.

not deceived. No one expects that they will be. It is the probable experience of the consumer that the court considers. Here, too, we have the manufacturer of the articles complained of, who explains, as usual, that, in adopting a trade name by which to identify his own product, he has been most "careful not to trespass on any rights" of complainant, and that "after considerable thought" he selected a name which should make the difference between his goods and complainant's "distinct and plain, so that there could be no possibility of mistake." It is a curious fact that so many manufacturers of proprietary articles, when confronted with some well-advertised trade name or mark of a rival manufacturer, seem to find their inventive faculties so singularly unresponsive to their efforts to differentiate. Thus, in one case, with the word "Cottolene" before him, defendant's best effort at differentiation resulted in "Cottoleo," and "Mongolia" seemed to another defendant entirely unlike "Magnolia." The manufacturer of the articles which defendants in the case at bar are selling seems to have had no better luck, for, with the word "Uneeda" before him, his device to avoid confusion was the adoption of the word "Iwanta." The incessant use of the personal pronouns in daily speech has associated in every one's mind the sounds represented by the letters "I" and "U"; the two words are of precisely the same length; both end with the same letter, "A"; and both express the same idea, namely, that the prospective purchaser's personal comfort would be promoted by the acquisition of a biscuit. There are, as also is usual, a number of minor differences between the forms and the dress of the two packages, which are expatiated upon in the affidavits and the brief; but no one can look at both packages without perceiving that there are strong resemblances, which could easily have been avoided had there been an honest effort to give defendants' goods a distinctive dress. Both

name and dress are clearly calculated to mislead, and the statements that both were adopted with an eye single to differentiation strain the credulity of the court beyond the breaking point. Complainant may take a preliminary injunction against the use of the trade-name "Iwanta," and of the present style of package; also against similar colorable imitations of complainant's trade-name, "Unceda," and of his style of package.

95 Fed. Rep., 135.

INJUNCTION ORDER.

UNITED STATES CIRCUIT COURT,

Southern District of New York.

National Biscuit Company,	}	In Equity.
<i>Complainant,</i>		
<i>vs.</i>		
Henry D. Baker and John P. Baker,		
<i>Defendants.</i>		

Complainant having moved the Court that a preliminary injunction issue against the above-named defendants in accordance with the prayer of the bill of complaint herein, and Charles K. Offield, Esq., of counsel for complainant, having been heard in support of the motion, and Arthur v. Briesen, Esq., of counsel for defendants, having been heard in opposition; it is, on motion of Offield, Towle & Linthicum, complainant's solicitors,

ORDERED that the said motion be and the same hereby is granted and that an injunction issue against the said defendants Henry D. Baker and John P. Baker and each of them and their respective agents, servants and employees and each of them enjoining and restraining them until the further order of this court from affixing, using or causing or permitting to be used or affixed to or upon any biscuits, crackers or other bakery products or packages thereof, handled or sold by them, or bought or procured to be sold by them, or for them, or either of them, or in which they are in any manner interested, the word "Iwanta" or "Unceda", or against similar colorable imitation thereof, or from affixing to any package of biscuit, crackers, or other bakery products, any wrapper, label or other covering in substantial imitation of the

wrapper, label and package of said complainant, or any similar colorable imitation of complainant's style of package, so contrived as to lead to the belief or to be calculated to lead to the belief or to be liable to cause the public to believe that the biscuit or crackers contained in such package, wrapper or other covering are manufactured and sold by the complainant.

Dated New York, Aug. 11, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed): United States Circuit Court, Southern District of New York.—National Biscuit Company, Complainant, vs. Henry D. Baker and John P. Baker, Defendants.—Order.—Briesen & Knauth, Solicitors for Defendants, 229 Broadway, Borough of Manhattan, New York.—U. S. Circuit Court, Filed Aug. 11, 1899, John A. Shields, Clerk.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } ss.

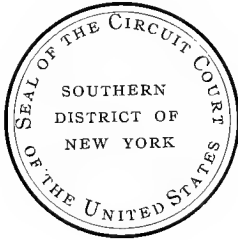
I, John A. Shields, clerk of the Circuit Court of the United States in and for the Second Circuit and Southern District of New York,

Do Hereby Certify that I have compared the preceding with the original Order granting Injunction in the cause entitled National Biscuit Company, Complainant vs. Henry D. Baker and John P. Baker, Defendants, on file and of rec-

ord in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at the City of New York, in the District and Circuit above-named, this 27th day of May, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-fourth.

JOHN A. SHIELDS,
Clerk.



Circuit Court of the United States

NORTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

THEODORE WEISE AND JOHN P. KENNEDY,
Defendants.

} IN EQUITY

ORDER, INJUNCTION AND ORDER
MAKING INJUNCTION PERPETUAL

OFFIELD, TOWLE & LINTHICUM
For Complainant.

ARCHIBALD CATTEL
For Defendants.

INJUNCTION ORDER.

CIRCUIT COURT OF THE UNITED STATES,
 NORTHERN DISTRICT OF ILLINOIS,
 NORTHERN DIVISION.

July 5, 1900,

Present, Hon. Christian C. Kohlsaatt, District Judge.

National Biscuit Company, 25,598. vs. Theodore Weise and John P. Kennedy.	}	Bill for Infringement of Trade-Mark and Equitable Rights.
-------------------------------------------------------------------------------------------------------	---	-----------------------------------------------------------------

This case coming on to be heard upon motion for preliminary injunction upon pleadings and affidavits filed and exhibits referred to, and having been duly heard and considered, it is ordered, adjudged and decreed as follows:

First: That the said complainant has good title and right in and to the said trade-mark or name "Kennedy's," or "Kennedy's Biscuit" and "Kennedy's City Soda Crackers" as applied to bakery products, and in and to the particular and special label, package or carton associated with the sale thereof as identified by the bill of complaint and filed herein.

Second: That the said defendants have violated and infringed upon said complainant's right, title and interest in and to said trade-name, marks or words "Kennedy's," "Kennedy's Biscuit" and "Kennedy's City Soda Crackers," and in and to the label, carton and package identified therewith.

Third: That the said defendants, and each of them, their servants and agents, and all claiming or holding through or under them, be until further order of the court enjoined and restrained from in any manner whatsoever making use of

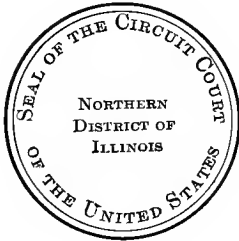
the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not by or for the complainant manufactured; and from in any manner whatsoever making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same, as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not manufactured by or for the complainant, which shall be put up in carton like those hereinbefore described as the packages by the defendants used and availed of, and otherwise in every way from making use in connection with the manufacture or sale of bakery products whatsoever, not of the complainant's production, of packages which shall be so nearly like the complainant's packages hereinbefore described as to be calculated to mislead; and otherwise in every way enjoining and restraining the said defendants from fraudulently making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit" in connection with the sale of bakery products, and from doing any act or thing whatsoever that shall be calculated to cause any bakery products not manufactured by the complainant to be offered or sold as Kennedy's Biscuit or Kennedy's City Soda Crackers, or as bakery products or crackers manufactured by or for the complainant.

NORTHERN DISTRICT OF ILLINOIS, }
NORTHERN DIVISION. } ss.

I, Marshall E. Sampsell, clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said court on the 5th day of July, A. D. 1900, in the cause wherein National Biscuit Company is the complainant and Theodore Weise *et al.* are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said district, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, }
 NORTHERN DISTRICT OF ILLINOIS, } ss.
 NORTHERN DIVISION.

THE UNITED STATES OF AMERICA,

To Theodore Weise and John P. Kennedy and to your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and to each and every of you, Greeting:

WHEREAS, It hath been represented to the Judges of our Circuit Court of the United States for the Northern Division of the Northern District of Illinois in Chancery sitting, on the part of National Biscuit Company, complainant, in its certain bill of complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the Judges of said Court, against you, the said Theodore Weise and John P. Kennedy, to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a Writ of Preliminary Injunction issue out of said court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Theodore Weise and John P. Kennedy, your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and each and every of you, that you DO ABSOLUTELY DESIST AND REFRAIN FROM in any manner whatsoever making use of the

words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not by or for the complainant manufactured; and from in any manner whatsoever making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit," or any words substantially like the same, as the name or designation, or as any part of the name or designation, of any bakery products whatsoever not manufactured by or for the complainant, which shall be put up in a carton like those hereinbefore described as the packages by the defendants used and availed of, and otherwise in every way from making use in connection with the manufacture or sale of bakery products whatsoever, not of the complainant's production, of packages which shall be so nearly like the complainant's packages hereinbefore described as to be calculated to mislead; and otherwise in every way enjoining and restraining the said defendants from fraudulently making use of the words "Kennedy's," "Kennedy's City Soda Crackers" or "Kennedy's Biscuit" in connection with the sale of bakery products; and from doing any act or thing whatsoever that shall be calculated to cause any bakery products not manufactured by the complainant to be offered or sold as Kennedy's Biscuit or Kennedy's City Soda Crackers, or as bakery products or crackers manufactured by or for the complainant, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under penalty of what the law directs.

To the Marshal of the Northern District of Illinois, to execute, and return in due form of law.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, in said District, this 5th day of July, in the year of our Lord one thousand nine

hundred and of our Independence the one hundred and twenty-fifth year.

S. W. BURNHAM,
Clerk.



NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the injunction writ, filed in said court on the 8th day of July, A. D. 1904, in the cause wherein National Biscuit Company, is the complainant and Theodore Weise *et al.* are the defendants, as the same appears from the original now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 8th day of July, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



ORDER MAKING INJUNCTION PERMANENT.

CIRCUIT COURT OF THE UNITED STATES,
 NORTHERN DISTRICT OF ILLINOIS,
 NORTHERN DIVISION.

June 5, 1902.

Present, Hon. Christian C. Kohlsaas, District Judge.

National Biscuit Company, 25,598.	vs.	} Bill for Infringement of Trade-Mark and Equitable Rights.
Theodore Weise and John P.		
Kennedy.		

This cause coming on to be heard upon the pleadings as filed herein, Messrs. Offield, Towle & Linthicum appearing as solicitors and of counsel for said complainant, the National Biscuit Company, Mr. Archibald Cattel appearing as solicitor and of counsel for the said defendants, Theodore Weise and John P. Kennedy, and it appearing to the court that the defendants do not desire further to contest this action, and that they have settled with the complainant for the damages, profits and costs arising out of the acts complained of, and that nothing remains as to said litigation except as to the subject-matter of the injunction. It is therefore ordered, adjudged and decreed, as follows, viz.:

That the *Interlocutory* injunction heretofore issued and served upon the defendants in this cause be, and the same hereby is, made *perpetual*, and that this decree be entered and stand as a final decree in the above cause.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

I, Marshall E. Sampsell, clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said court on the 5th day of June, A. D. 1902, in the cause wherein National Biscuit Company is the complainant and Theodore Weise *et al.* are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said District, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



Circuit Court of the United States

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NATIONAL BISCUIT COMPANY	}	IN EQUITY
<i>Complainant,</i>		
vs.		
THE OHIO BAKING COMPANY, STEPHEN C.	}	No. 6131
MORRIS and GEORGE E. COLLINGS,		
<i>Defendants.</i>		

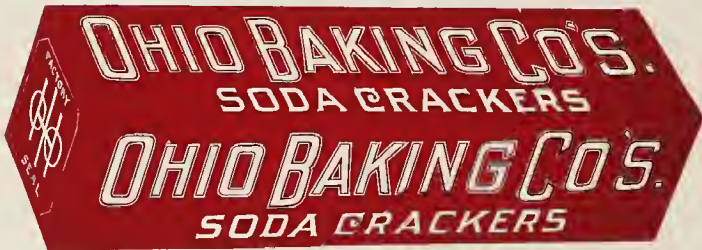
OPINION AND DECREE

SQUIRE, SANDERS & DEMPSEY
OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

For Complainant.

BANNING & BANNING
BENJAMIN C. STARR

For Defendants.



NATIONAL BISCUIT COMPANY vs. OHIO BAKING CO. ET AL.

(Circuit Court of the United States, Northern District Ohio, Eastern Division. December 21, 1900.)

No. 6131.

1. UNFAIR COMPETITION—IMITATION OF PACKAGES.

While a defendant may have the right to use every one of the elements entering into complainant's trade-mark and packages if used separately, yet his use of the same in combination, for the evident purpose of imitating in appearance complainant's packages, constitutes unfair competition.

In Equity. On motion for preliminary injunction. For opinion on appeal, see 127 Fed., 116.

Squire, Sanders & Dempsey, Offield, Towle & Linthicum, and Earl D. Babst, for complainant.

Banning & Banning and Benjamin C. Starr, for defendants.

WANTY, District Judge. In this case a motion for a preliminary injunction has heretofore been filed, and was argued the other day, and I have come to a conclusion in the matter. The bill in this case was filed to restrain the defendants from infringing the complainant's trade-mark and to restrain fraudulent competition in imitating the complainant's packages or cartons in size and color and general appearance. The defendants claim that they have the right to use the straight lines and curves in a trade-mark, that they have the right to use the word "seal," that they have the right to use white lines on a red background, and that they have the right to use cartons of a particular size, and that they have the right to use the different colors which

¶1 Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

they have adopted for their packages, and that the complainant cannot appropriate any of these things so as to preclude others from their use. All of these claims of the defendants are true, but it is apparent, under the showing here, that the defendants deliberately sat down and made their packages as like in general appearance to the complainant's packages as would be necessary to catch the customer and escape the courts. They had the right to use the background used by the complainant, they had the right to use clipped corners and the word "Seal," they had the right to use any color that the complainant used for cartons, and they had the right to use packages of the size used by the complainant. But when they used all these things in combination, the object is too apparent to admit of argument. The defendants put up a package which they say is exactly the size of complainant's package, because it contains the same quantity of crackers, which, if put up in a convenient manner, necessarily compels the use of the same-size package. But this does not explain why on the largest-size package the defendants have the exact shade of red used by complainant, and have the white lettering of substantially the same type, and on the next-size package, they have blue, like complainant's. Why did they not use blue on the largest-size package and red on the smaller? No one can read the pleadings and affidavits in this case and escape the conclusion that the defendants are endeavoring to appropriate the trade of the complainant by imitating, in its general effect, its seal and packages, and to escape the legal effect of such an attempt by making dissimilar minor details. The fraud is apparent, and the motion for a preliminary injunction will be granted.

FINAL DECREE.

THE UNITED STATES OF AMERICA,
 NORTHERN DISTRICT OF OHIO,
 EASTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States, within and for the Eastern Division of the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the 7th day of said month, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh, to wit: On Friday, the 22nd day of May, A. D. 1903.

Present; the Honorable Francis J. Wing, U. S. District Judge.

Among the proceedings then and there had were the following, to wit:

National Biscuit Company, }
vs. } In Equity.
 The Ohio Baking Company, } 6131.
 Stephen C. Morris, and George }
 E. Collings. }

This cause coming on to be heard upon pleadings and proof, and having been fully argued by counsel respectively for both parties litigant; Mr. Charles K. Offield, Mr. Andrew Squire, and Mr. Earl D. Babst, for Complainant; Mr. Thomas A. Banning, and Mr. Benjamin C. Starr, for Defendants: And the court being fully advised, and having fully considered the same, ORDERS, ADJUDGES, and DECREES as follows:

1. That the said Complainant, the National Biscuit Company's "In-er-seal" Trade Mark is a good and valid Trade

Mark, and the complainant has full right and title thereto, and therein, as alleged in said bill of complaint filed herein.

2. That the said defendants have infringed upon and violated said complainant's "In-er-seal" Trade Mark, as alleged in said bill of complaint, by putting up and selling bakery products in cartons or packages like those marked "Complainant's Exhibits Defendants' Infringing Packages Nos. 1, 2 and 3" and "Defendants' Exhibits Nos. 13, 14 and 15."

3. That the said defendants have violated complainant's equitable rights; in putting up, selling and offering for sale, cartons or packages of bakery products which present a general appearance as to collocation of size, shape, color, lettering, spacing and ornamentation, closely resembling complainant's several exhibits respectively referred to in the bill of complaint, and marked as "Complainant's Exhibits."

4. That the said defendants, and each of them, their agents, servants, and employes, be and hereby are, enjoined until the further order of this court from

a. Imitating or simulating complainant's "In-er-seal" Trade Mark, or manufacturing, handling, or selling cartons of bakery products having thereon any imitation of complainant's "In-er-seal" Trade Mark, calculated to mislead or deceive; like those marked Complainant's Exhibits Defendants' Infringing Packages Nos. 1, 2 and 3, and Defendants' Exhibits Nos. 13, 14 and 15, but this shall not be construed as restraining defendants from selling cartons or packages of bakery products with their asserted Trade Mark thereon, provided such Trade Mark is so differentiated in general appearance and application from said complainant's Trade Mark that it is not calculated to deceive the ultimate ordinary purchaser.

b. From putting up and selling, or offering for sale, the

particular forms of cartons or packages referred to in the bill of complaint, and identified therein as "Complainant's Exhibit Defendants' Infringing Packages Nos. 1, 2 and 3," or any other form of packages or cartons, respectively, which shall, by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance as closely resembling complainant's several exhibits respectively, referred to in the bill of complaint and marked as Complainant's Exhibits—as do the said defendants' respectively infringing packages Nos. 1, 2 and 3, but this shall not be construed as restraining defendants from selling packages or cartons of the size, weight and shape of complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from said complainant's respective packages that they are not calculated to deceive the ultimate ordinary purchaser.

5. That the said complainant has a right to recover any and all profits accruing to the said defendants from the unlawful violation and infringement of said complainant's rights, and to recover all damages suffered by and accruing to said complainant by reason of the commitment of said unlawful and infringing acts, together with the costs herein to be taxed, and that the same may be referred to Irvin Belford, he being a suitable person as Master of this Court, and approved by the parties to take, state and report an account of such damages and profits under and in accordance with this decree, and that upon such accounting the testimony heretofore taken by either party in this case, may be read by either party, and referred to and considered by said master.

In open court the defendant prayed an appeal, which was allowed and bond fixed at \$500.00.

THE UNITED STATES, }
OF AMERICA. } ss.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for the Northern District of the State of Ohio, do hereby certify that I have compared the within and foregoing transcript with the original decree entered upon the Journal of the proceedings of said Court in the therein entitled Cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Cleveland, in said District, this 1st day of June, A. D. 1903, and in the 127th year of the Independence of the United States of America.

IRVIN BELFORD,

Clerk.

By THOMAS M. SHERLOCK,

Deputy Clerk.



United States Circuit Court of Appeals

SIXTH CIRCUIT

OHIO BAKING COMPANY, STEPHEN C.
MORRIS and GEORGE E. COLLINGS,
Appellants.

vs.

NATIONAL BISCUIT COMPANY
Appellee

IN EQUITY

No. 1232

OPINION

THOMAS A. BANNING
EPHRAIM BANNING
BENJAMIN C. STARR

For Appellants.

SQUIRE, SANDERS & DEMPSEY
OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

For Appellee.

OHIO BAKING CO. *ET AL.* *vs.* NATIONAL BISCUIT COMPANY

(Circuit Court of Appeals of the United States, Sixth Circuit.
January 21, 1904.)

No. 1232.

1 TRADE MARK—PROTECTION—INFRINGEMENT.

The right of the owner of a trade-mark to be protected in the exclusive use thereof is not dependent on the federal statute authorizing registration.

2. SAME—NATURE OF RELIEF—UNFAIR DOMESTIC COMPETITION.

Where the ground for relief in a suit for infringement of a trade-mark was unfair competition in domestic commerce, and the cause of action alleged was an imitation of plaintiff's trade-mark on cartons used in local trade, and there was no allegation that complainant's foreign trade was injured by the acts complained of, the fact that the trade-mark was registered, and that complainant was entitled to protection under the federal statute with regard to foreign commerce, was immaterial.

3. SAME—EVIDENCE.

Complainant's "In-er-seal" trade-mark, as known to the public, was printed in white letters on a vivid red back-ground of a peculiar shade, and applied to the ends of cracker and biscuit cartons, in which complainant's goods were packed for sale. Shortly thereafter defendant conceived a trade-mark with the words "Factory Seal" printed on the same colored labels, which it applied to the ends of similar packages of its biscuits. At the time defendant adopted this trade-mark it knew complainant's crackers were the only ones sold with the red seal on the end of the cartons, and that its trade-marks were liable to deceive careless purchasers. *Held*, that defendant's trade-mark, when so printed and used, was an infringement on complainant's trade-mark, and should be enjoined.

Appeal from the Circuit Court of the United States for the Northern District of Ohio. For opinion below, see 127 Fed., 160.

Thomas A. Banning, Ephraim Banning, and Benjamin C. Starr, for appellants.

Squire, Sanders & Dempsey, Earl D. Babst, and Offield, Towle & Linthicum, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and THOMPSON, District Judge.

RICHARDS, Circuit Judge. In March, 1900, the complainant below, the National Biscuit Company, was engaged in the manufacture and sale of bakery products, consisting of biscuits, crackers, etc. It owned and operated some 75 plants, located in the leading cities of the United States, the products of which were put out in packages or cartons under different factory names, indicating their character and origin. For the purpose of identifying all these products, making them known to the public, and guarantying their authenticity, it adopted an arbitrary design or symbol known as the "In-er-seal" trade-mark for use on its cartons, and at a cost of hundreds of thousands of dollars advertised it throughout this country and the world as the mark by which its goods might be recognized. Except for the use of some green and orange labels, which were soon abandoned, the "In-er Seal" trade-mark was printed in white letters upon a vivid red label with clipped corners, and applied to the ends of the cartons. The trade-mark was registered, the application being filed May 12, 1900. In the latter part of August, 1900, the defendant below, the Ohio Baking Company, was engaged at Cleveland, Ohio, in making and selling bread and cakes. It had been so engaged for 17 years. At this time, having decided to enter upon the biscuit and cracker business, it employed one Miles, a former employe of the National Biscuit Company, and gave him charge as manager of the cracker department about to be established. Within three or four weeks afterwards it began to place its biscuits and crackers upon the market, packed in cartons of substantially the same size as those used by the National Biscuit Company, and in some cases of the same color, style of ornamentation, and general appearance, all having on the ends, printed in white letters upon red labels with clipped corners, a fanciful figure, known as the

“Factory Seal” trade-mark, which the Ohio Baking Company, upon entering the cracker business, for the first time adopted and began to use. This trade-mark was registered, the application being filed October 9, 1900. For the purpose of comparison, the two trade-marks are shown in the following illustrations, the vivid red background being designated by the black background:



The original suit was brought by the National Biscuit Company, to restrain the Ohio Baking Company and its officers from advertising or selling its goods in any package having on it the "In-er-seal" trade-mark or any imitation thereof, or in any package dressed in imitation of one used by the National Biscuit Company, and for an accounting of the profits made by such unfair competition.

On an application for a preliminary injunction, Judge Wanty restrained the defendant below, first, from using the "In-er-seal" trade-mark upon cartons containing its bakery products, as shown in certain exhibits, or advertising or selling its bakery products in cartons containing thereon the "In-er-seal" trade-mark or any imitation thereof; and, second, from putting up and selling or offering for sale the particular cartons shown in certain exhibits, or any other cartons resembling the complainant's cartons as closely as they do. But this was not to be construed as restraining the defendant from selling cartons of the size, weight, and shape of the complainant's, nor from using the respective colors as wrappers, provided they were so differentiated in general appearance as not to be calculated to deceive the ultimate ordinary purchaser. There was an appeal from Judge Wanty's order, and this court reversed the portion respecting the use of the "In-er-seal" trade-mark or any imitation thereof, but affirmed the rest. Upon the return of the case to the Circuit Court, an application was made to Judge Severens for an attachment for contempt against the defendant below for putting out certain cartons in violation of the second part of Judge Wanty's order, but Judge Severens discharged the rule, holding that the cartons did not present a general appearance so closely resembling the complainant's exhibit mentioned in the restraining order as to come within its terms. Afterwards the case came on

for hearing before the Circuit Court, Judge Wing sitting, upon the pleadings and proof, and a decree was rendered in favor of the complainant, holding: (1) That the "In-er-seal" trade-mark is a good and valid trade-mark. (2) That the defendants have infringed this trade-mark by putting up and selling bakery products in cartons like those shown in certain exhibits mentioned. (3) That the defendants have violated the complainant's equitable rights in putting up and selling its bakery products in cartons which present a general appearance closely resembling those of the complainant as shown in certain exhibits. (4) That the defendants be enjoined: (a) From imitating the "In-er-seal" trade-mark, or making, handling, or selling cartons of bakery products having thereon any imitation of the "In-er-seal" trade-mark, calculated to mislead or deceive, like those shown in certain exhibits; "but this shall not be construed as restraining defendants from selling cartons or packages of bakery products with their asserted trade-mark thereon, provided such trade-mark is so differentiated in general appearance and application from said complainant's trade-mark that it is not calculated to deceive the ultimate ordinary purchaser." (b) From putting up and selling or offering for sale the particular forms of cartons shown in certain exhibits, or cartons resembling them so closely as to mislead or deceive; but this shall not be construed as restraining the defendants from selling cartons of the size, weight, and shape of the complainant's, but so differentiated in general appearance as not to be calculated to deceive the ordinary purchaser. (5) That the complainant has the right to recover all profits accruing from the violation and infringement of its rights, and that the case be referred to a master to take and report an account of the damages and profits. From this decree an appeal has been taken to this court.

The right to be protected in the exclusive use of a trade-mark is not dependent on the federal statute authorizing the registration of certain trade-marks. It has been long recognized by the common law and enforced by the chancery courts of England and this country. The use of a trade-mark is to distinguish one's goods. No man has a right to use or imitate the trade-mark of another, and thus represent his goods as the goods of another. However broad the field of competition, it does not include the use of a rival's trade-mark, either directly or covertly, for the purpose of deceiving the public, and marketing his own goods as those of his rival. The one question of fact in this case is whether the "Factory Seal" trade mark, when printed in white letters upon a red label with clipped corners, and applied to the ends of cartons containing bakery products, bears such a resemblance to the "In-er-seal" trade-mark, when similarly applied, as to deceive the ordinary purchaser, and lead him to believe he is purchasing the goods of the National Biscuit Company, when in fact he is getting the goods of the Ohio Baking Company. *McLean v. Fleming*, 96 U. S., 255, 24 L. Ed. 828; *Manufacturing Co. v. Trainer*, 101 U. S., 65, 25 L. Ed., 993; *Coats v. Merrick Thread Co.*, 149 U. S., 562, 13 Sup. Ct., 966, 37 L. Ed., 847. We have made a careful inspection of the cartons and trade-marks of the respective companies, and are satisfied not only that the "Factory Seal" trade-mark as applied is calculated to mislead and deceive the ordinary purchaser, but that it was designed, adopted, and used for that purpose. Its use was a part of the "cracker campaign" planned in advance. The National Biscuit Company's crackers were the only ones with a red seal on the end of the cartons. The defendants below knew this. And they knew also that crackers are sold for the most part over the counter to careless buyers, who

are not apt to examine the carton carefully, but likely to carry in mind some one distinguishing feature, such as a red seal on the ends. The crackers of the National Biscuit Company are put out under many names. Thus the plant at Toledo was called the Worts-Kirk-Bigelow plant, one at Chicago the Kennedy, another the Bremner, and so on. The name of the factory would mean nothing, the presence of the red seal everything to the servant girl or child sent to the grocery for a box of "In-er-seal" crackers. The careless purchaser asking for a box "of those red seal crackers" would take the "Factory Seal" goods, thinking he was getting the "In-er-seal" goods.

But it is insisted that this is a suit on a registered trade-mark, and that a trade-mark cannot be extended beyond the limits fixed in the registration. This is not, however, a suit on a registered trade-mark. Neither the allegations nor the proof would entitle the complainant to relief under the federal act. *Warner v. The Searle & Hereth Co.*, 191 U. S., 195, 24 Sup. Ct., 79, 48 L. Ed.—. There is no evidence showing that the trade of the National Biscuit Company with foreign countries was injured by the acts complained of. The ground of the relief sought is unfair competition in domestic commerce—the fraudulent imitation of the complainant's trade-mark and cartons for use in local trade. Conceding, as Mr. Justice Fuller says, in *Watch Co. v. Watch Case Co.*, 179 U. S., 666, 674, 21 Sup. Ct., 270, 45 L. Ed., 365, that in this class of cases "such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of," they are present in ample measure in the record. The trade-mark which the court is asked to protect is therefore, so far as this suit is concerned, a common-law trade-mark, and its limits are to be determined by its ap-

plication and use. As Mr. Justice Shiras said in *Kohler Mfg. Co. v. Beeshore*, 59 Fed., 572, 575, 8 C. C. A., 215, 218: "We are not willing to affirm the proposition that the registration in the Patent Office of a certain name or phrase as a trade-mark * * * will in all cases prevent or estop the owner from adopting and using another name or phrase as a trade-mark." The legal effect of the registry of a trade-mark being restricted to foreign commerce and that with the Indian tribes, it would seem that as to domestic commerce a person might adopt and use a different trade-mark than that registered. Now, the trade-mark actually used—the "In-er-seal" trade-mark, as known to the public—was printed in white letters upon a vivid red background of a peculiar shade. Before the defendants began to place their goods upon the market, this vivid red color had become associated with the "In-er-seal" trade-mark. The defendants below knew this when they put their "Factory Seal" trade-mark upon the vivid red background of precisely the same shade. While it is true no one has the right to monopolize a particular color, yet the courts have repeatedly held that a person may be restrained from using a particular color, in combination with other things, to mislead the public, and market his goods as those of another. *Garrett v. T. H. Garrett & Co.*, 78 Fed., 472, 24 C. C. A., 173; *Fairbank Co. v. Bell Mfg. Co.*, 77 Fed., 869, 23 C. C. A., 551; *Hires Co. v. Consumers' Co.*, 100 Fed. 809, 41 C. C. A., 71; *Morgan Co. v. Whittier Co.* (C. C.), 118 Fed., 657; *Cohen v. Delavina* (C. C.), 104 Fed. 946. We are satisfied that the "Factory Seal" trade-mark, when printed on the vivid red background and applied to the ends of a cracker or biscuit carton, is an infringement of the "In-er-seal" trade-mark, and should be enjoined.

It is submitted that the decree of the Circuit Court en-

joining the use of any imitation of the "In-er-seal" trade-mark is inconsistent with the order of this court reversing the first part of Judge Wanty's restraining order respecting the trade-mark. But Judge Wanty's order restrained the use of the "Factory Seal" trade-mark in any manner whatsoever in connection with biscuit or cracker cartons, while the decree of the Circuit Court provides that it may be used when so differentiated in general appearance and application from the "In-er-seal" trade-mark as not to be calculated to deceive the ultimate ordinary purchaser. So that in affirming this decree, it is not necessary to prohibit the use in any manner whatsoever of the "Factory Seal" trade-mark, but only its use in a way calculated to mislead and deceive.

But, however this may be, the case is now before us upon the merits, which we have carefully examined, and we are satisfied that the manner in which the "Factory Seal" trade-mark has been used is calculated to mislead and deceive, and constitutes an infringement of the "In-er-seal" trade-mark.

The judgment of the Circuit Court is affirmed.

127 Fed. Rep., 116.

Supreme Court of the United States

OCTOBER TERM, 1904

OHIO BAKING COMPANY, STEPHEN C.
MORRIS and GEORGE E. COLLINGS,

Petitioners,

vs.

NATIONAL BISCUIT COMPANY

Respondent.

No. 382

PETITION FOR WRIT OF CERTIORARI
AND ORDER DENYING PETITION

THOMAS A. BANNING
EPHRAIM BANNING

For Petitioners.

CHARLES K. OFFIELD
EARL D. BABST

For Respondent.

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1904.

The Ohio Baking Company, Stephen C. Morris and George E. Collings, <i>Petitioners,</i> vs. National Biscuit Company, <i>Respondent.</i>	}	On Petition for Writ of Certiorari directed to the United States Circuit Court of Appeals for the Sixth Circuit.
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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Ohio Baking Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and Stephen C. Morris, treasurer and general manager of said company, and George E. Collings, president of said company, respectfully represents and shows unto your Honors as follows:

1. That about the 1st day of March, 1900, the National Biscuit Company adopted what is generally known as its "Iner Seal" trade-mark—being the misspelled words "inner seal," indicating that the package was sealed on the inside, and a purely arbitrary figure or design—for use on various kinds of bakery products including biscuits, crackers, wafers, cakes, bread, snaps, jumbles, etc. The trade-mark has usually been printed on seals or labels which have been applied to the boxes, packages or cartons in which the goods were put up for the market. This seal or label has usually been applied to the end of the carton or package. The trade-mark has been printed on orange, green or red colored seals or labels. The trade-mark

printed on one of the red end labels or seals appears as follows:



2. That in the bill of complaint charging infringement of the complainant's "Iner Seal" trade-mark, in the fourth paragraph of the bill, the characteristics, peculiarities, and distinguishing things and features of such "Iner Seal" trade-mark are stated and alleged to be the following:

"An oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a "double-T-shaped" figure or cross tree, while within said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersecting bar appear the letters "I N" and on the opposite side of said perpendicular intersecting bar and above said horizontal division-bar appear the letters "E R" the lower section of said oval-shaped figure having therein the word "Seal."

3. That the National Biscuit Company, registered its

“Iner Seal” trade-mark in the Patent Office, the certificate of registry being dated September 18, 1900, and numbered 35,108, on an application filed May 12, 1900. The certificate of registry of such trade-mark will be found in the Record, following page 160. In the specification of such registration, which was sworn to, the National Biscuit Company stated the things in which the trade-mark consisted as follows:

“Said trade-mark consists of an arbitrarily selected design or symbol representing an oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a “double-T-shaped” figure or cross-tree, while within said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersection bar appear the letters “I N” and on the opposite side of said perpendicular intersecting bar and above said horizontal division-bar appear the letters “E R” the lower section of said oval-shaped figure having therein the word “Seal.”

And afterwards in said specification, after stating that the trade mark was not confined to the size of the end labels, nor to their application to the end of the package, nor to the shape of the label, nor to the size of the letters and figures, nor to the color of the letters and figures, nor to the color of the label or background, nor to the style of the letters, nor to the color of the border of the figure or the bars, nor to a white color for the letters or bars, the National Biscuit Company declared the real and essential features of the trade-mark in the following words:

“The essential and paramount feature of said trade-mark consisting of an oval-shaped figure divided centrally and horizontally in the direction of its greatest length by a bar from which extends a perpendicular bar which is intersected near its upper end by two horizontal cross-

bars, while within said oval-shaped figure and above said central horizontal bar appear the letters "I N" and "E R," while below said horizontal dividing-bar appears the word "Seal." "

4. That about the 1st day of August, 1900, your petitioner, the Ohio Baking Company, adopted what is generally known as its "Factory Seal" trade-mark, consisting of the monogram word "Ohio," being the designating or localizing word of its corporate name. The words "factory seal" indicate that the package was filled and sealed at the factory so as to place responsibility in case the goods are found defective. The trade-mark has usually been applied to cartons or packages containing bakery products by printing it upon the end seals. The foundation color of these end seals or labels from the commencement has been red. A sample of such end seals is submitted as follows:



5. That your petitioner, the Ohio Baking Company, also registered its "Factory Seal" trade-mark in the Patent Office, the certificate of registry being dated December 18, 1900, and numbered 35,597, on an application filed October 9, 1900. The certificate of registry of such trade-mark will be found in the back of the record.

6. That in December, 1900, the National Biscuit Company filed its bill of complaint in the United States Circuit Court for the Northern District of Ohio, Eastern Division, charging your petitioners with infringement of its "Iner Seal" trade-mark, applied to packages and cartons of crackers and bakery products, by the use, by the Ohio Baking Company, of its "Factory Seal" trade-mark, the monogram word "Ohio," as shown in the sample above.

7. That in January, 1901, a preliminary injunction order was entered by his Honor, Judge George P. Wanty, restraining your petitioners, first, "from applying or using complainant's 'Iner Seal' trade-mark, in any manner whatsoever, upon or in connection with bakery products," as shown in certain infringing packages 1, 2 and 3; and, secondly, from putting up or selling cartons or packages like the packages 1, 2 and 3 or others "which shall, by reason of the collocation of size, shape, colors, lettering, spacing and ornamentation, present a general appearance closely resembling complainant's several exhibits respectively" as did the packages 1, 2 and 3, but at the same time the order provided that "this shall not be construed as restraining defendants from selling packages or cartons of the size, weight and shape of complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from said complainant's respective packages that they are not calculated to deceive the ultimate ordinary purchaser." (Record, 141-2.)

8. That an appeal was taken from the injunction order entered by Judge Wanty on an assignment of errors, appearing at page 143 of the record, which appeal was argued in the United States Circuit Court of Appeals for the Sixth Circuit in due course, resulting in an order by said Court of Appeals reversing the decree of Judge Wanty, so far as the infringement of the trade-mark was concerned, but affirming his decision so far as simulating complainant's wrappers was concerned. In accordance with such order, a mandate was issued and filed in the court below on the 24th day of June, 1901, as and for its judgment in the case. (Record, 147.)

9. That from the entry of the order of injunction by Judge Wanty until the 24th day of June, 1901, when the mandate was filed in the court below, your petitioner, the Ohio Baking Company, discontinued the use of its end seals containing its trade-mark—the monogram word "Ohio"—but when the mandate was filed on the 24th of June, 1901, it again began to use the same trade-mark—the monogram word "Ohio"—on its end labels precisely the same in every respect as it had used them before the decision of Judge Wanty; but it used such end labels and trade-marks on packages differing in the coloring and ornamentation of their wrappers from the original packages 1, 2 and 3, which had been enjoined. This was the only change made—the change in the wrappers.

10. That thereupon the National Biscuit Company moved before his Honor Judge Henry F. Severens, who was one of the judges who had heard and decided the case in the Court of Appeals, to have your petitioners attached for contempt of court; and the charge and denial of contempt were argued before him, and on the 24th day of August, 1901, an order was entered by him discharging the rule to show cause, etc. The opinion of Judge Severens

will be found at page 149 of the Record, and the order entered under such opinion will be found at page 150.

11. That thereupon proof for final hearing was taken by the parties respectively and the cause brought on for argument before his Honor Judge Francis J. Wing, on the 27th day of March, 1903. Judge Wing ordered a decree to be entered against your petitioners both as to the infringement of the trade-mark and as to the simulation of the wrappers of the cartons or packages. This decree was entered on the 22nd day of May, 1903, and will be found beginning at page 153 of the Record. A perpetual injunction was granted restraining your petitioners both as to the trade-mark and as to the simulation, and the case referred to a Master for an assessment of damages and profits.

12. That your petitioners thereupon prayed an appeal from the order and decision of Judge Wing to the United States Circuit Court of Appeals for the Sixth Circuit, in which court the appeal was duly argued, and on or about the 21st day of January, 1904, decided by said court, affirming Judge Wing's decision. (Rec. 170; 127 Fed. Rep., 116.)

13. That your petitioner attach hereto and submit herewith, as a part hereof, a certified printed copy of the record and the opinion of the United States Circuit Court of Appeals affirming the decision of Judge Wing, as the same are on file in the office of the clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

14. *That your petitioners have been aggrieved, and, as they believe, a miscarriage of justice has been caused in this case:*

By the confusion into which the Circuit Court and the Court of Appeals appear to have fallen as to the law relating to trade-marks proper and the law governing unfair competition;

By the conclusion of the Court of Appeals that the suit was not founded on the complainant's registered trade-mark, and, therefore, not subject to the same rules of construction as govern registered trade-marks;

By giving to the complainant's "Iner Seal" trade-mark, both in the Circuit Court and in the Court of Appeals, a broader construction than the complainant's pleadings and registration justified, inasmuch as the bill of complaint and the registration both stated that it consisted in certain things and features;

By apparently considering that the bill was for unfair competition in trade rather than for infringement of a technical trade-mark, and yet enjoining your petitioners as for the infringement of a technical trade-mark;

By protecting the complainant in the use of its trade-mark when "printed in white letters upon a vivid red background of a peculiar shade," notwithstanding the statements of the complainant's registration that the color of the end labels or seals was immaterial;

By giving the complainant a practical monopoly of the color red as a background for end seals or labels;

By finding infringement of the "Iner Seal" trade-mark because the "Factory Seal" trade-mark was printed in white letters on a red background;

By protecting the complainant in the use of red for its end seals or labels notwithstanding it was not using red end seals exclusively at the time the Ohio Baking Company began to use red end seals or labels, but was using other colors as well;

By not holding that the complainant had disintitiled itself to relief in equity for unfair competition in view of the evidence that it had adopted "substantially all colors" (Q. 24, Rec. 13) for the wrappers of its cartons or packages, thus seeking to monopolize all colors;

By holding that the "Factory Seal" trade-mark when

printed on a red background and applied to the ends of cracker or biscuit cartons was an infringement of the "Iner Seal" trade-mark, thus attaching importance to the color of the background on the trade-mark branch of the case;

By attaching importance in the trade-mark branch of the case to the manner in which the "Factory Seal" trade-mark had been used;

By holding that there had been an improper simulation of the complainant's wrappers in view of the fact that the complainant, in order to match up the color and appearance of the defendant's packages 1, 2 and 3, held to be an improper simulation, was obliged to bring in packages from its Chicago and Toledo factories;

By holding that the "careless purchaser asking for a box 'of those red seal crackers' would take the 'Factory Seal' goods, thinking he was getting the 'Iner Seal' goods," thus making the action of a careless person instead of an ordinary purchaser determinative of the probability of deception;

By disregarding the fact that the red color, white figures and letters, clipped corners, size of seal, etc., were shown by the evidence to be matters of utility instead of mere fanciful or arbitrary features;

By applying the abstract principle "that as to domestic commerce a person might adopt and use a different trade-mark than that registered" to this case where the complainant has not adopted and has not used a "different" trade-mark, but identically the one registered; and

By affirming the decision of Judge Wing and in not reversing such decision.

Wherefore, your petitioners pray that this Honorable Court will take cognizance of the matters herein set forth and referred to and will grant unto your petitioners a writ of certiorari requiring said cause and the record thereof to be certified to it by the United States Circuit Court of

Appeals for the Sixth Circuit, for its review and determination, pursuant to the provisions of the statute in such case made and provided, and that your petitioners may have such other and further relief in the premises as the nature and circumstances of their case may require.

And your petitioners will ever pray, etc.

THE OHIO BAKING CO.,
GEORGE E. COLLINGS,
STEPHEN C. MORRIS.

United States of America, Northern District of Ohio, State of Ohio, Cuyahoga County, ss:

George E. Collings, president of the Ohio Baking Company, one of the above named petitioners, being duly sworn, upon oath says that he has read the foregoing petition and knows the contents thereof and that the same is true in substance and matter of fact.

GEORGE E. COLLINGS.

Subscribed and sworn to before me this 2nd day of September, 1904.

(SEAL.) F. T. SHOLES,
Notary Public.

We hereby certify that the foregoing stated grounds in support of the petition for a writ of certiorari in the above entitled cause, are, in our opinion, well founded in point of law.

THOMAS A. BANNING,
EPHRAIM BANNING,
Counsel for Petitioners.

Circuit Court of the United States

WESTERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY	}	IN EQUITY
<i>Complainant,</i>		
<i>vs.</i>		
WILLIAM DEININGER, HENRY E. DEININGER, LOUIS C. DEININGER and FREDERICK C. J. DEININGER, co-partners, and doing business under the firm name and style of DEININGER BROTHERS,		
<i>Defendants.</i>		

DECREE AND INJUNCTION

CHARLES K. OFFIELD
ADELBERT MOOT
EARL D. BABST
For Complainant.

FREDERICK F. CHURCH
For Defendants.



FINAL DECREE.

UNITED STATES CIRCUIT COURT.

Western District of New York.

National Biscuit Company	}	Final Decree.
<i>vs.</i>		
William Deininger, Henry E. Deininger, Louis C. Deininger, and Frederick C.		
J. Deininger, copartners and doing business under the firm name and style of Deininger Brothers.		

This cause coming on to be heard upon the pleadings as filed, Mr. Charles K. Offield appearing in behalf of the complainant and Mr. Frederick F. Church in behalf of defendants, and it appearing to the Court that said defendants do not desire further to contest or defend this action, but admit the truth of the allegations in the bill of complaint; and the said defendants have tendered and paid the costs to the date of this cause as taxed by the clerk, and also have settled and paid the damages caused to complainant by the commitment of the unlawful acts as set forth in the bill of complaint; and that no remaining question is presented except the matter relating to the granting of an injunction. It is therefore ordered, adjudged and decreed that an injunction issue under and in accordance with the allegations of, and the prayer of, the bill of complaint filed herein, and that this decree and order be, and is final.

JOHN R. HAZEL,

U. S. J.

Endorsed: Circuit Court of U. S., Western Dist. of N. Y. National Biscuit Company *agst* William Deininger *et al.* Final Decree. Adelbert Moot, Counsel for plaintiff, 45 Erie County Savings Bank Building, Buffalo, N. Y. U. S. Circuit Court, Western Dist. of N. Y. Filed Jul. 30, 1901. Harris S. Williams, Clerk.

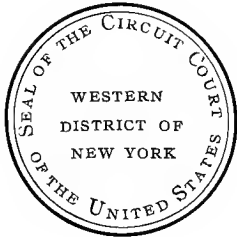
UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK. } ss.

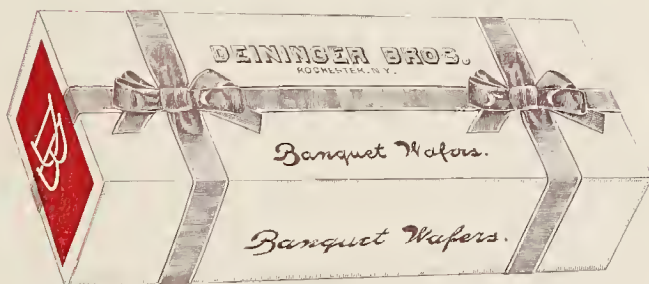
I, Harris S. Williams, Clerk of the Circuit Court of the United States, for the Western District of New York, do hereby certify that I have compared the annexed copy of Final Decree in re National Biscuit Company *vs.* William Deininger *et al.* with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

In Testimony Whereof, I have caused the seal of the said court to be affixed at the City of Buffalo, in said District, this 27th day of May, A. D. 1904.

HARRIS S. WILLIAMS,
Clerk.





INJUNCTION.

UNITED STATES OF AMERICA, }
 WESTERN DISTRICT OF NEW YORK. } ss.

The President of the United States, to William Deininger, Henry E. Deininger, Louis C. Deininger and Frederick C. J. Deininger, and each of them, and their and each of their servants, agents, and employes and all claiming or holding through or under them, Greeting:

WHEREAS, the National Biscuit Company has lately exhibited its bill of complaint against the said William Deininger, Henry E. Deininger, Louis C. Deininger and Frederick C. J. Deininger, copartners and doing business under the firm name of Deininger Brothers, as defendants, in the Circuit Court of the United States for the Western District of New York, before the Judges of said Court, praying to be relieved touching the matters therein complained of; and

WHEREAS, by a final decree of said court made on the 30th day of July, 1901, it was ordered that a writ of injunction issue under the seal of said Court under and in accordance with the allegations of, and the prayer of said bill of complaint,

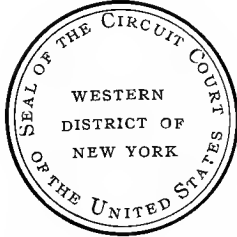
NOW, THEREFORE, in consideration of the premises, you, the said William Deininger, Henry E. Deininger, Louis C. Deininger and Frederick C. J. Deininger, and each of you, and your, and each of your, servants, agents and employes, and all claiming or holding through or under you or them, are hereby strictly commanded and enjoined under the pains and penalties which may fall upon you and each of you in

case of disobedience, that you and each of you, do absolutely desist and abstain, forthwith and forever, from the manufacture, use or sale of bakery products containing the complainant's ribbon-tying trade-mark, label, and design, upon any carton for bakery products having a wrapper or label thereon simulating the ribbon-tying design and effect disclosed by complainant's wrapper and label, and do absolutely desist and abstain forthwith and forever from manufacturing, using or selling labels or cartons in, or for, or with, bakery products containing the red end seal, sign or symbol of complainant, having therein circular and straight white lines arranged practically at right angles to each other; and from in any manner whatsoever, handling, advertising, or selling bakery products or packages containing thereon complainant's trade-marks or imitation or simulation thereof, or from using complainant's said trade-marks or packages or any imitation thereof upon any wrapper, package, box or carton, or by any means that may be adopted in the sale of their bakery products of any description; or any imitation of complainant's said trade-marks or packages, labels or wrappers that may be in any way calculated to deceive or mislead, and otherwise do absolutely desist and abstain, forthwith and forever, in every way, from fraudulently using complainant's trade-marks, packages, labels or wrappers, or any imitation or simulation thereof, in the sale of bakery products, or from violating or infringing the equitable rights of complainant in the premises herein complained of and set forth.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at the City of Buffalo, N. Y., in said district, this 5th day of February, one thou-

sand nine hundred and two, and of our Independence, the one hundred and twenty-sixth.

HARRIS S. WILLIAMS,
Clerk.



OFFIELD, TOWLE & LINTHICUM,
Solicitors for Complainant.

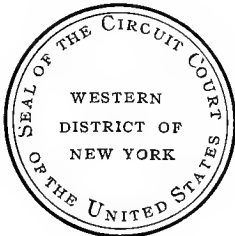
UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK. } ss.

I, Harris S. Williams, clerk of the Circuit Court of the United States, for the Western District of New York, do hereby certify that I have compared the annexed copy of Injunction in re National Biscuit Co. vs. William Deininger *et al.* with the original entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

In Testimony Whereof, I have caused the seal of the said court to be affixed at the City of Buffalo, in said District, this 27th day of May, A. D. 1904.

HARRIS S. WILLIAMS,
Clerk.



Circuit Court of the United States

NORTHERN DISTRICT OF ILLINOIS

NORTHERN DIVISION

NATIONAL BISCUIT COMPANY
Complainant,

vs.

DAKE CRACKER COMPANY, J. A. BERNARD
HOSSACK, WILLIAM P. FENNELL and
ABEL L. ALLEN,
Defendants.

} IN EQUITY

OPINION, INJUNCTION AND ORDER
MAKING INJUNCTION PERPETUAL

OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

For Complainant.

W. P. FENNELL

For Defendants.

OPINION.

IN THE UNITED STATES CIRCUIT COURT, }
NORTHERN DISTRICT OF ILLINOIS, } No. 26,043.
NORTHERN DIVISION.

KOHLSAAT, District Judge.

This matter comes on for hearing upon complainant's motion for a preliminary injunction restraining defendant corporation and the individual defendants from the use of the word "Dake" either alone or in connection with other words, upon or with reference to crackers or other bakery products.

I am of the opinion that the moving papers establish the property right in complainant to the use of the word "Dake" in connection with bakery products. Several defenses are interposed among which is that of abandonment. This I consider an affirmative defense, the burden of establishing which is upon defendants. The affidavits on this point are conflicting, but I deem the showing as to continued, though diminished, use by complainant, not overcome by defendants' affidavits.

The other defenses I do not think available.

A preliminary injunction may be entered, restraining defendants from using the word "Dake" in connection with bakery products, either alone or with prefixes or suffixes.

See *International Silver Co. v. Rogers Co. et al.*, 110 Fed., 955.

(Endorsed) Filed May 25, 1904, Marshall E. Sampson,
Clerk.

NORTHERN DISTRICT OF ILLINOIS, }
NORTHERN DIVISION. } ss.

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the Opinion, filed in said Court on the 25th day of May, A. D. 1904, in the cause wherein National Biscuit Company is the complainant and Dake Cracker Co. et al. are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS } ss.
NORTHERN DIVISION.

THE UNITED STATES OF AMERICA,

To Dake Cracker Company, a corporation, and J. A. Bernard Hossack, William P. Fennell and Abel L. Allen, doing business jointly with and as officers and managers of Dake Cracker Company, and to your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and to each and every of you, Greeting:

WHEREAS, It hath been represented to the Judges of our Circuit Court of the United States for the Northern Division of the Northern District of Illinois in Chancery sitting, on the part of National Biscuit Company, complainant in its certain bill of complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the Judges of said Court, against you, the said Dake Cracker Company, a corporation, and J. A. Bernard Hossack, William P. Fennell and Abel L. Allen, doing business jointly with and as officers and managers of Dake Cracker Company, to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a Writ of Preliminary Injunction issue out of said Court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the

said Dake Cracker Company, a corporation, and J. A. Bernard Hossack, William P. Fennell and Abel L. Allen, doing business with and as officers and managers of Dake Cracker Company, your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and each and every of you, that you DO ABSOLUTELY DESIST AND REFRAIN FROM in any manner whatsoever, manufacturing, handling, using, selling or advertising the bakery products all packages containing thereon, or in connection therewith your orator's said trade-mark or name, or any imitation or simulation thereof; also, from using your orator's trade name or mark on any package of any description, or any simulation or imitation thereof, upon any wrapper, box, carton, or barrel, or by any means whatsoever that may be adopted in the sale of bakery products of any description, that may be in any way calculated to deceive and otherwise enjoining and restraining in every way the said defendant from fraudulently using said trade-mark, or trade name, or any simulation or imitation thereof in the manufacture, use or sale of bakery products, or from violating or infringing the equitable rights of your orator in the premises herein complained of and set forth, or from using the word "Dake" in connection with bakery products, either alone or with prefixes or suffixes, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

To the Marshal of the Northern District of Illinois, to execute and return in due form of law.

WITNESS The HON. MELVILLE W. FULLER, Chief Justice of the United States of America, at Chicago, in said District, this 30th day of December, in the year of our Lord

one thousand nine hundred and one and of our Independence
the one hundred and twenty-sixth year.

S. W. BURNHAM,
Clerk.



NORTHERN DISTRICT OF ILLINOIS, }
NORTHERN DIVISION. } ss.

I, S. W. Burnham, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of an Injunction Writ issued out of this Court on the 30th day of December, A. D. 1901, in the cause wherein the National Biscuit Company is the complainant and the Dake Cracker Company et al. are the defendants, as the same appears from the original issued out of and under the seal of this Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 30th day of December, A. D. 1901.

S. W. BURNHAM,
Clerk.



ORDER MAKING INJUNCTION PERPETUAL.

CIRCUIT COURT OF THE UNITED STATES, }
NORTHERN DISTRICT OF ILLINOIS, }
NORTHERN DIVISION. }

May 28, 1902.

Present, Hon. Christian C. Kohlsaas, District Judge.

National Biscuit Company } 26,043.
vs. } In Equity.
Dake Cracker Company and J. A. } Bill for Infringement
Bernard Hossack. } of Trade Name, etc.

This cause coming on to be heard this 28th day of May, 1902, upon the pleadings as filed, Messrs. Offield, Towle & Linthicum, attorneys for and appearing in behalf of said complainant, the National Biscuit Company, and Mr. W. P. Fennell, attorney for and appearing in behalf of the defendant; and it appearing to the Court that said defendants do not desire further to contest or defend this action, and admit the truth of the allegations of the bill of complaint; and that said defendants have tendered and paid the costs in this action as taxed by the clerk, and have also settled for and paid to complainant the damages caused to plaintiff by the commitment of the unlawful acts as set forth in the bill of complaint, and that no remaining question is presented except and relating to the matter of the granting of the injunction therein.

It is therefore ordered, adjudged and decreed that the preliminary injunction heretofore granted in this case is hereby made perpetual, and that this decree and order be, and is, final.

NORTHERN DISTRICT OF ILLINOIS, }
NORTHERN DIVISION. } ss.

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said Court on the 28th day of May, A. D. 1902, in the cause wherein National Biscuit Company is the complainant and Dake Cracker Company et al. are the defendants, as the same appears from the original records thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said District, this 26th day of May, A. D. 1904.

MARSHALL E. SAMPSELL,
Clerk.



Circuit Court of the United States

MIDDLE DISTRICT OF PENNSYLVANIA

NATIONAL BISCUIT COMPANY
Complainant,

vs.

LAWRENCE WALTER,
Defendant.

} **IN EQUITY**

ORDER, INJUNCTION AND DECREE

CHARLES K. OFFIELD
EARL D. BABST
H. C. REYNOLDS
For Complainant.

S. J. STRAUSS
For Defendant.



UNITED STATES CIRCUIT COURT, }
 MIDDLE DISTRICT OF PENNSYLVANIA. }

National Biscuit Company, }
 Complainant, } In Equity.
 vs. } Motion for Injunction.
 Lawrence Walter, }
 Defendant. }

INJUNCTION ORDER.

This cause coming on to be heard upon the 21st day of May, A. D. 1902, at 10 o'clock A. M., upon motion for injunction as filed, and upon the pleadings and affidavits filed herein, Messrs. Charles K. Offield and H. C. Reynolds, solicitors and of counsel for the motion, and S. J. Strauss for the defendant, the court having duly considered the same,

And it appearing to the court, from the bill of complaint, exhibits and affidavits filed herein, that the motion should be granted:

It is, therefore, ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue under, and in accordance with the allegations of, and the prayer of the bill of complaint filed herein, to continue in effect until the next term of this court.

R. A. ARCHBALD,
District Judge.

INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, }
 MIDDLE DISTRICT OF PENNSYLVANIA. } ss.

THE UNITED STATES OF AMERICA,

To Lawrence Walter, and to your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants and Workmen, and to each and every of you, Greeting:

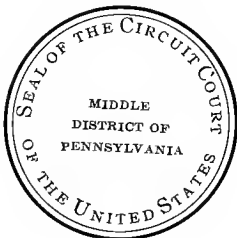
WHEREAS, It hath been represented to the Judges of our Circuit Court of the United States for the Middle District of Pennsylvania in Chancery sitting, on the part of National Biscuit Company, complainant in its certain bill of complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the judges of said court, against you, the said Lawrence Walter to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a Writ of Preliminary Injunction issue out of said court, upon said bill, enjoining and restraining you, and each of you, as provided for in said bill; We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Lawrence Walter, your Counselors, Attorneys, Solicitors, Trustees, Agents, Clerks, Employes, Servants, and Workmen and each and every of you, that you DO ABSOLUTELY DESIST AND REFRAIN FROM the manufacture, use or sale of cartons or packages, or bakery products, contained in cartons, having thereon a red label or wrapper simulating the red label wrapper of complainant; and do absolutely desist and restrain from the

manufacture, use, or sale of cartons or packages containing bakery products, having thereon a red label or wrapper, with accompanying markings complained of; or from, in any manner whatever, advertising or selling bakery products or packages having thereon, substantially, complainant's red label or wrapper, or any marking or imitation thereof, or simulation thereof, that may be in any way calculated to, in any way, mislead or deceive; and otherwise do absolutely restrain from forthwith, in any other way, fraudulently using said complainant's red label wrapper upon cartons or packages, or in connection with the manufacture and sale of bakery products; or otherwise violating or infringing the equitable rights of complainant, as set forth and specified in complainant's bill of complaint, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

To the Marshal of the Middle District of Pennsylvania to execute, and return in due form of law.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Scranton, in said District, this 21st day of May in the year of our Lord one thousand nine hundred and two; and of our Independence the one hundred and twenty-sixth year.

A. J. COLBURN, JR.,
Deputy Clerk.



FINAL DECREE.

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

National Biscuit Company, <i>Complainant.</i>	}	No. 7, October Term, 1902.
<i>versus</i>		<i>Bill for an In-</i>
Lawrence Walter, <i>Defendant.</i>		<i>fringement, etc.</i> <i>Unfair Competition.</i>

This cause coming on to be heard upon the 23rd day of April, A. D. 1904, at ten o'clock A. M., upon the final pleadings, and proofs, and the Court being fully advised and having duly considered the same,

IT IS THEREFORE ORDERED, adjudged and decreed:

First: That the said complainant has good right and title in and to the red label or wrapper used by them in the manufacture and sale of cartons or packages of graham crackers, like or substantially like "Complainant's Exhibit, Complainant's Label and Wrapper Package," identified by complainant's bill of complaint and presented as an exhibit in this case.

Second: That the defendant has infringed and violated the right and title of said complainant, as above identified, by selling and purchasing and selling cartons or packages of graham crackers, having thereon a red label or wrapper like or substantially like complainant's red label or wrapper, and having thereon lettering and marking like or substantially like complainant's lettering and marking, upon complainant's exhibit, and as particularly shown by "Complainant's Exhibit, Defendant's Cartons or Packages," present as an exhibit in this case.

Third: That this cause be referred to Henry A. Knapp,

Esq., one of the Masters in Chancery in this Court, to take testimony and ascertain and report to this Court the profits accruing to the defendant, by reason of the commitment of the unlawful acts here found, and the damages accruing to the complainant, by reason of such acts, with full power to summon and command the attendance of the defendant for examination with all books and papers relevant to such examination, and to summon and command also the attendance of all witnesses having knowledge of facts relevant to the determination of questions involved in this issue of reference; and that the testimony heretofore taken in this cause shall be before said Master so far as relevant to this reference. Said Master to report to this Court his findings and conclusions thereon.

Fourth: That the preliminary injunction heretofore granted, and now in force, is hereby made perpetual, and the complainant have and recover from the defendant the costs in this case to be taxed, and have execution therefor.

R. A. ARCHBALD,
District Judge.

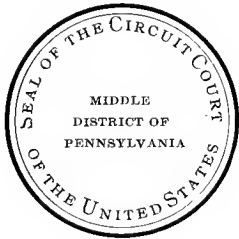
UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF PENNSYLVANIA. } sct.

I, Edward R. W. Searle, Clerk of the Circuit Court of the United States of America, for the Middle District of Pennsylvania in the Third Circuit, do hereby certify that

the writings annexed to this certificate are true copies of their respective originals on file and now remaining among the records of said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Scranton, this 31st day of May in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the 128.

E. W. R. SEARLE,
Clerk of C. C.



Circuit Court of the United States

WESTERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY
vs.
IRA SWICK,

Complainant,
Defendant.

} IN EQUITY

STIPULATION FOR INJUNCTION, OPINION AND DECREE

MOOT, SPRAGUE, BROWNELL & MARCY
OFFIELD, TOWLE & LINTHICUM
EARL D. BABST

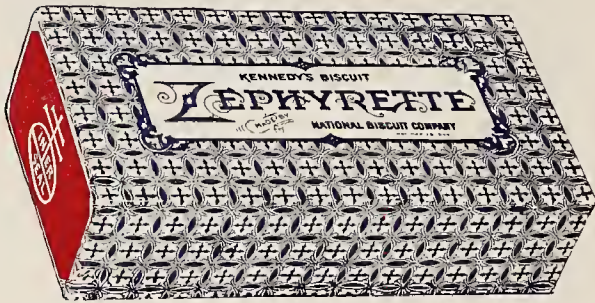
For Complainant.

BANNING & BANNING
BENJAMIN C. STARR

For Defendant.







STIPULATION FOR INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT
OF NEW YORK.

National Biscuit Company, <i>Complainant.</i>	}	In Equity.
<i>v.</i>		
Ira Swick, <i>Defendant.</i>		

It is hereby stipulated and agreed by and between the above parties, by their counsel, respectively, that an injunction may be entered in the above entitled cause against the defendant enjoining him from using the "Long Branch Biscuit Ribbon-Tying" design, the trade-mark or name "Zephyrette," and the trade-mark or name "Excelsior" or "Excelsior Butter Cracker" as prayed for in the bill of complaint in the above entitled cause, but without costs, profits or damages to which the complainant might be entitled for the past, the same having been mutually agreed upon and arranged.

It is further stipulated and agreed that the Ohio Baking Company, manufacturer of the cartons and packages sold by the defendant containing the above mentioned trade-marks, names or designs, shall cease and discontinue the use of each of the above trade-marks, names or designs on or before the First day of January, 1902, and in consideration thereof the complainant hereby releases and quit claims under said agreement and arrangement the said Ohio Baking Company from any and all claim for damages

or profits which it might have against said Company on account of its use prior to January 1, 1902, of each of said trade-marks, names or designs whether used on packages, sold to the defendant herein or others.

OFFIELD, TOWLE & LINTHICUM,

Solicitors for Complainant.

BANNING & BANNING,

Solicitors for Defendant.

(United States Circuit Court, Western Division New York. March 17, 1903.)

No. 134.

1. TRADE-MARKS—INFRINGEMENT.

A technical trade-mark, although not a facsimile of another, may be so used by a rival manufacturer as to imitate another's trade-mark, and, when such use actually deceives the public, it constitutes an infringement, against which a court of equity will grant relief.

2. SAME.

Complainant used and registered a trade-mark consisting of a square label or seal of a vivid red color, with the corners clipped, on which was an arbitrary combination of straight and curved lines in white, in which were printed the letters and word "In-er-seal." These labels were placed on the ends of complainant's cartons containing bakery products. Another manufacturer of the same class of goods registered as a trade-mark, and used in the same manner on its cartons, a label the same in size, shape, and color, having thereon a combination of white lines consisting of circles and straight lines with the words "Factory" and "Seal" printed thereon. The figure or symbol was not the same, but the general effect of the combination in a label used in the same place on a carton of the same size, shape, and color, together with a similar figure and the word "Seal," was to simulate the trade-mark of complainant, and to deceive purchasers. Held, that such use of defendant's trade-mark was an infringement of that of complainant, which entitled it to an injunction.

In Equity. Suit for infringement of trade-mark. On final hearing.

Moot, Sprague, Brownell & Marcy, Offield, Towle & Linthicum, and Earl D. Babst (Charles K. Offield, of counsel), for complainant.

Banning & Banning and Benjamin C. Starr, for defendant.

HAZEL, District Judge. The bill as originally filed, charges the defendant with unlawful infringement of a trade-mark and five trade-names used by complainant upon its various bakery products. A stipulation was filed before answer, admitting infringement by defendant as to five of the trade-names. Accordingly a decree was entered by

consent of all parties restraining and enjoining the future use of such trade-names by the defendant. The alleged infringement by the defendant of complainant's "In-er-seal" registered trade-mark No. 35,108, dated September 18, 1900, is now the sole and specific subject for judicial determination.

COMPLAINANT'S TRADE-MARK.



DEFENDANT'S TRADE-MARK.



The defendant's infringement consists in the use of the registered trade-mark No. 35,597, dated December 18, 1900, issued to the Ohio Baking Company.

The proofs show that complainant manufactures various kinds of bakery products, which it places upon the market in special and distinct sizes of cartons or packages. Such cartons and packages widely vary in form and coloring, and are lettered on their sides in different size type. Upon the ends of each package or carton is applied the trade-mark printed upon a square label or seal, clipped at the corners, in clear white lines upon a vivid red background. The proofs further show that the trade-mark seal has since its adoption regularly been applied to the ends of the cartons in the manner described, except in a few instances. Complainant con-

tends that its product has become well known to the general public because of the peculiarly quaint configuration of its trade-mark, which is uniquely displayed. The bill charges the adoption of the trade-mark on or about the month of March, 1899, and its subsequent registration in the office of the Commissioner of Patents May 12, 1900. It is specifically described as—

“An arbitrarily-selected design or symbol representing an oval-shaped figure separated centrally and horizontally in the direction of its greatest length by a bar, from which there rises centrally and at right angles thereto a perpendicular bar, which near its upper end is intersected by double horizontal cross-bars, thus forming what might be designated as a ‘double-T-shaped’ figure or cross-tree, while with said oval-shaped section and above the horizontal dividing-bar and to the left of the perpendicular intersecting bar appear the letters ‘I N,’ and on the opposite side of said perpendicular intersecting bar appear the letters ‘E R,’ the lower section of said oval-shaped figure having therein the word ‘Seal.’”

The specification describes and the drawings show the design as applied upon a rectangular background, the corners thereof being clipped or irregular. The specification states a preference for the employment of a bright red or orange-colored background in connection with the trade-mark design with the figures and lines printed in white. The specification further says that the purpose and object of the peculiarity of the design is to produce a conspicuous effect, securing the greatest possible prominence. The design is usually printed on the labels attached to the ends of the cartons or packages containing complainant’s product. This arbitrary and fanciful designation was first appropriated by complainant as a trade-mark for its bakery product, and it is, therefore, entitled to protection from infringement. It quite clearly appears from the evidence that complainant’s trade-mark has been extensively advertised at large expense

throughout the United States and in the locality where the defendant carries on his business of selling bakery products, and where the alleged infringing trade-mark is asserted to have been fraudulently used. The defendant is a dismissed employe of the complainant. He was well acquainted with complainant's customers in the territory where the alleged infringements were committed. Soon after his dismissal from complainant's employ, he commenced to divert the trade of complainant by introducing the bakery product of a competitive manufacturer, and finally simulated complainant's trade-mark, as a result of which his sales increased. Defendant's bakery product is manufactured by the Ohio Baking Company, and is put upon the market wrapped up in carton form, sealed at the ends, and having a vivid red rectangular label at each end, clipped at the corners. Upon the seals or square labels is imprinted in distinctive white lines the registered trade-mark of the Ohio Baking Company, above set forth. The labels upon which is printed the infringing device as to color, size, and irregular shape are in similitude of complainant's labels or seals. The configuration of the infringing trade-mark consisting of curved and straight lines, flaring at the ends in resemblance of complainant's lines, is more particularly described in the specification as consisting of three parallel vertical bars and central cross-bar and two circles arranged in the manner shown by the figure itself. Defendant claims that the Ohio Company trade-mark really consists of a fanciful monogram of the word "Ohio," and that he has the right to use it in any size, shape, and color. Prominently appearing in defendant's label are the words "Factory" at the upper end and "Seal" at the lower end. This also would appear to be in simulation of the word "In-er-seal" printed on complainant's device. The packages or

cartons of both complainant and defendant have printed matter upon their sides, indicating the character of their contents and the name of the manufacturer. The form of the package and style of type and color of wrapper are concededly the property of the public, as, indeed, are the labels clipped at the corners having a bright red background. No point is made to any similitude of cartons, style, or color of print, nor even of the separate features of complainant's trade-mark. The defendant contended generally on argument that the specifically defined trade-mark of complainant as to its general features and characteristics must be interpreted as limiting its scope to that which is actually described. If this contention means that complainant is restricted to the use of the trade-mark, and has obtained no exclusive right in the collocation of its parts and the distinguishing features by which the trade-mark has become known to the public, such contention is without merit. The gist of the complaint is a violation of a trade-mark, which is composed of a peculiar configuration of lines and a combination of other features. In other words, the distinguishing characteristics of the trade-mark consist in the circles and straight lines in relation to each other, and printed upon the label in white and upon a vivid red background. In the case of *Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C.)*, 109 Fed. 317—a case of unfair competition—it was held that no one can have a trade-mark monopoly of any color of paper, or any shape of label, or any color of ink, or any one or other detail, yet the general collocation of such details will be protected. The sole question, therefore, is whether the defendant's design for a trade-mark imprinted on a vivid red background in simulation of complainant's design is fairly within complainant's asserted exclusive scope.

That complainant's trade-mark and manner of displaying the same attracts the public attention cannot be successfully disputed. Undoubtedly, complainant's manufactured product has become extensively known to the public solely by its peculiar trade-mark. I have no doubt that an intending purchaser of complainant's product using ordinary care is attracted to the arbitrary trade-mark design, and not to any printed words on the sides of the packages, or even to the nomenclature of the manufacturer of the product. When both designs were exhibited on the hearing, I became well satisfied that defendant's device and manner of applying it in combination with the other features are in imitation of complainant's. Such resemblance tends to deceive an ordinary purchaser giving the usual attention, and causes him to purchase the one believing it to be the other. Although defendant's device and configuration is not in strict resemblance to complainant's yet force is given to the impression which I obtained on the hearing because of the adoption by defendant of a bright red background and a label clipped at the corners of corresponding size to that of complainant. The record discloses that the trade-mark seal of the defendant and the manner of displaying it upon the ends of cartons and packages is likely to deceive the ordinary purchaser into the belief that he was purchasing the product of complainant. By the testimony of defendant's witness Gaiser, a grocer, it appears that an intending purchaser must make a close examination of both packages in order to distinguish defendant's packages and cartons from complainant's. The witness was unable at the hearing, when both packages were exhibited to him, to discover much difference, and was compelled to look for the name of the manufacturer to distinguish the product of complainant from that of

defendant. Other evidence was given by complainant upon the hearing showing the similitude of the respective trade-marks to be such as to deceive the public into buying the bakery product of defendant under the impression that they are buying those of complainant. Irrespective, however, of such proof, the trade-mark imprinted upon a bright red-colored label, clipped at the corners, and of corresponding size to complainant's is alone calculated to deceive, and must be regarded as an infringement of complainant's rights secured by its registered trade-mark. Specific proof of purchases by individuals actually deceived under such circumstances appears not to be necessary. *Cleveland Stone Co. v. Wallace* (C. C.), 52 Fed. 431; *National Biscuit Co. v. Baker* (C. C.), 95 Fed. 135; *Von Mumm v. Frash* (C. C.), 56 Fed. 830. In the controversy it is immaterial that the size of cartons, color of wrapper, size and kind of label, and separate features of complainant's trade-mark are old, and may, therefore, be used by any one. The complainant's trade-mark, its features of coloring, rectangular labels, white lines on a vivid background, manner of displaying the arbitrary designation at the ends of the packages, all in combination, are peculiarly distinguishing marks for its goods. I am well satisfied that a technical trade-mark, although not a fac-simile of another, may, nevertheless, be so used by a rival manufacturer as to imitate another's trade-mark, and when such use actually deceives the public a court of equity will afford relief. *Scheuer v. Muller*, 20 C. C. A. 161, 74 Fed. 225; *Draper v. Skerrett* (C. C.), 94 Fed. 912. I have examined the case of *Richter v. Anchor Remedy Co.* (C. C.), 52 Fed. 455, and other cases cited by counsel, but such cases are either not in point or do not disturb the conclusion reached. By the manner of defendant's use of the Ohio Baking Company's trade-

mark he obtains a benefit to which he is not entitled. He appropriates the good will of a rival business by purloining his rival's method of dressing his vendible goods. *City of Carlsbad v. Schultz* (C. C.), 78 Fed. 471; *Sprague Elec. Ry. & Motor Co. v. Nassau Elec. Ry. Co.*, 37 C. C. A. 286, 95 Fed. 821. As Judge Wanty said when the case against the Ohio Baking Company was before him on application for preliminary injunction, "Why does the defendant use the exact shade of red used by complainant?" Further inquiry is pertinent. Why white letters of substantially the same type? Why labels of uniform size, and with clipped corners? Other questions of like kind may be propounded. The record discloses no satisfactory answer, and therefore it is manifest that the defendant deliberately and fraudulently imitates the trade-mark of complainant, and in that manner designs to palm off his goods for those of complainant.

The complainant may have a decree, with costs, enjoining the defendant from imitating or simulating complainant's "In-er-seal" trade-mark, as set out in this opinion. So ordered.

121 Fed. Rep. 1007.

FINAL DECREE.

UNITED STATES CIRCUIT COURT, }
 WESTERN DISTRICT OF NEW YORK. }

National Biscuit Company, }
 Complainant, } *Bill for Infringement of*
 vs. } *Trade-mark.*
 Ira Swick, } *Decree.*
 Defendant. }

This cause coming on to be heard upon pleadings and full proof, and having been fully argued by counsel respectively, for both parties litigant: Mr. Charles K. Offield, Mr. Adelbert Moot, and Mr. Earl D. Babst, for complainant; Messrs. Banning & Banning, and Mr. Benjamin C. Starr, for defendant; and the court being fully advised, and having duly considered the same, orders, adjudges and decrees:

First: That the said complainant, the National Biscuit Company's In-er-seal Trade-mark is a good and valid Trade-mark, and the complainant has full and unquestioned title thereto and therein, as alleged in the bill of complaint filed herein.

Second: That the said defendant, Ira Swick, has infringed upon and violated said complainant's In-er-seal trade-mark, as alleged in said bill of complaint.

Third: That the said defendant, his agents, servants, attorneys, and employes be, and hereby are enjoined from applying or using complainant's In-er-seal trade-mark in any manner whatsoever, upon, or in connection with, bakery products; or in any manner whatsoever, handling, selling, or advertising bakery products, or packages, or cartons containing bakery products having thereon complainant's said trade-mark, or any imitation or simulation thereof.

Fourth: That the said complainant has the right to recover any and all damages accruing to, or arising out of said unlawful violation and infringement of said trade-mark by said defendant, together with the cost herein to be taxed; and that this cause be referred to George P. Keating, he being a suitable person as Master of this Court, to take, state and report an account of such damages under and in accordance with this decree, and that upon said accounting the testimony heretofore taken by either party in this cause may be read by either party, and considered by the Master.

JOHN R. HAZEL,
U. S. J.

Endorsed: U. S. Circuit Court, Western District of New York. In Equity. National Biscuit Company. vs. Ira Swick. Decree. U. S. Circuit Court, Western Dist. of N. Y. Filed Mar. 28, 1903. Harris S. Williams, Clerk.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF NEW YORK. } ss.

I, Harris S. Williams, Clerk of the Circuit Court of the United States, for the Western District of New York, do hereby certify that I have compared the annexed copy of Decree with the original entered and on file in this office,

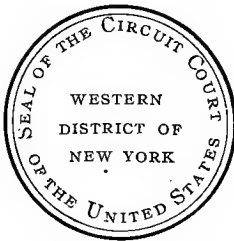
and that the same is a correct transcript therefrom, and of the whole of said original.

And I further certify that I am the officer in whose custody it is required by law to be.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Buffalo, in said District, this 6th day of April, A. D. 1903.

HARRIS S. WILLIAMS,

Clerk.



Circuit Court of the United States

SOUTHERN DISTRICT OF NEW YORK

NATIONAL BISCUIT COMPANY a corporation, <i>Complainant,</i>	}	IN EQUITY
<i>vs.</i>		
HENRY PUNCHARD, Sr. and HENRY PUNCH- ARD, Jr., co-partners, doing business as HENRY PUNCHARD & SON, <i>Defendants.</i>	}	

DECREE AND INJUNCTION

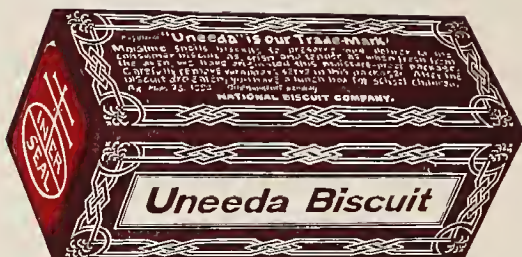
EDMUND WETMORE
CHARLES K. OFFIELD
EARL D. BABST

For Complainant.

JOHN A. MAPES

For Defendants.





FINAL DECREE.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

National Biscuit Company, a corporation, vs. Henry Punchard, Sr., and Henry Punchard, Jr., co-partners, doing business as Henry Punchard & Son.	}	Complainant, Defendants.
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This cause coming on to be heard under the pleadings as filed, and Mr. Edmund Wetmore, Mr. Earl D. Babst and Mr. Charles K. Offield, appearing in behalf of the complainant, and Mr. John A. Mapes in behalf of the defendants, and it appearing to the Court that the said defendants do not desire to further contest this action, but have made a certain settlement of the same and assented as follows:

(1) That the said complainant is the rightful and exclusive owner of the trade-name "Uneeda" or "Uneeda Biscuit" as alleged in said bill of complaint, and is the rightful and exclusive owner of the trade-mark "In-er-seal", consisting of a vivid red background, square in shape with uniform clipped corners having white line markings thereon and applied to each end of the bakery cartons or packages with a marginal exposure surrounding the same, and is the rightful and exclusive owner of the wrapper application, word collocation and decorative appearance of the wrapper surrounding and enclosing said carton or package, as appears by complainant's exhibits filed herewith.

(2) That the said defendants, Henry Punchard, Sr., and

Henry Punchard, Jr., have infringed and violated these exclusive rights, trade-name, trade-mark and wrapper embellishment by the use upon such cartons of the words "Uluka Biscuit," as appears upon the sides of defendants' cartons, and of the bright red seal upon the ends thereof with white line accompanying markings thereon and by the wrapper simulation of complainants, as appears by "Complainant's Exhibit Defendants' Infringing Carton" filed herein.

(3) That the Manhattan Biscuit Company, a corporation organized under the laws of the State of New Jersey, etc., puts up, makes and sells the infringing cartons with the wrapper accompaniment as disclosed by the defendants' carton, and instigated and authorized the commitment of the infringing acts above found.

(4) That the defendants having settled for the damages and profits suffered by the complainant and accruing to the defendants by reason of these infringing acts, no reference to a master for an accounting is made, but it is—

ORDERED, ADJUDGED AND DECREED that a perpetual injunction issue as prayed for in the bill of complaint in the manner and to the extent demanded in the fourth subdivision of the prayer for relief contained in the complainant's bill of complaint and that the defendants pay the taxable court costs in this action and in default thereof that execution issue therefor.

Dated New York, November 3, 1904.

E. HENRY LACOMBE,
U. S. Circuit Judge.

I hereby consent to the entry of the above decree.

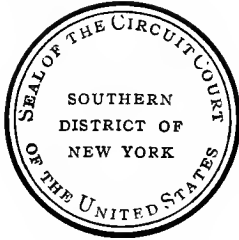
JOHN A. MAPES,
Defendants' Solicitor.

We hereby consent to the entry of the above decree.

EARL D. BABST,
OFFIELD, TOWLE & LINTHICUM,
Complainant's Solicitors.

EDMUND WETMORE,
CHARLES K. OFFIELD,
EARL D. BABST,
Of Counsel.

(Endorsed) United States Circuit Court, Southern District of New York. National Biscuit Co., Complainant, vs. Henry Punchard, Sr., et al., Defendants. FINAL DECREE. Earl D. Babst & Offield, Towle & Linthicum, Solrs. for Complt. 34 Pine St., New York. U. S. Circuit Court, Southern District of New York, Filed Nov. 3, 1904, John A. Shields, Clerk.



A copy.

JOHN A. SHIELDS,
Clerk.

INJUNCTION.

THE PRESIDENT OF THE UNITED STATES OF
AMERICA,

To Henry Punchard, Sr., and Henry Punchard, Jr., their clerks, attorneys, servants, agents and workmen, and each and every of them, Greeting:

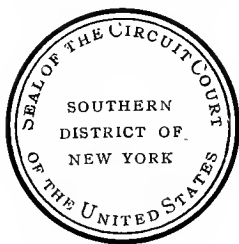
WHEREAS, it has been represented to us in our Circuit Court of the United States for the Second Circuit and Southern District of New York, that the complainant, National Biscuit Company, is the rightful and exclusive owner of the trade-mark "Uneeda" or "Uneeda Biscuit", as alleged in the bill of complaint herein, and is the rightful and exclusive owner of the trade-mark "In-er-seal", consisting of a vivid red background square in shape with uniform clipped corners having white line markings thereon and applied to each end of the bakery cartons or packages, with a marginal exposure surrounding the same, and is the rightful and exclusive owner of the wrapper application, word collocation and decorative appearance of the wrapper surrounding and enclosing said carton or package, as appears by complainant's exhibits filed with said bill of complaint, and that the said defendants, Henry Punchard, Sr., and Henry Punchard, Jr., have infringed and violated these exclusive rights, trade-name, trade-mark and wrapper embellishment by the use upon such cartons of the words "Ulika Biscuit", as appears upon the sides of defendants' cartons, and of the bright red seal upon the ends thereof with white line accompanying markings thereon, and by the wrapper simulation of complainant;

NOW, THEREFORE, we strictly command and enjoin you, the said Henry Punchard, Sr., and Henry Punchard, Jr.,

and each of you, your servants, agents and employes, and all claiming or holding through or under you, under the penalties that may fall upon you in case of disobedience that you forthwith permanently and forever desist from in any manner whatsoever handling, advertising or selling the packages heretofore sold by defendants, complained of in the bill of complaint and hereinabove described, or making use of the word "Ulika" or "Ulika Bis-kit", or any word substantially like it or them, as the name or designation, or as a part of the name or designation connected with any biscuit upon any package used in the sale of biscuits, and from in any manner whatsoever making use of the word or words "Ulika" or "Ulika Bis-kit", or any other word substantially like it as the name or designation, or part of the name or designation upon any wrapper on any package of biscuits or crackers whatsoever; or from the use of said word or name upon any package or packages like those hereinabove described as the packages or cartons of said defendants, and in every way from making use in connection with the sale or advertisement of biscuit the words "Ulika" or "Ulika Bis-kit" upon any packages so nearly like your orator's package hereinbefore described as to be calculated to mislead, or from in any way using upon the ends of such packages or cartons a label or seal of red background with white line markings thereon, as shown upon the ends of defendants' packages herein complained of, or from advertising by picture representations your orator's said trade-names or trade-mark and wrapper ornamentation, as appears in "Complainant's Exhibit Defendants' Advertisement No. 1", and "Complainant's Exhibit Defendants' Poster Infringement No. 2", and from violating and infringing the rights of your orator in the premises as hereinbefore set forth.

WITNESS the Hon. Melville W. Fuller, Chief Justice of the United States at the City of New York, Borough of Manhattan, on the 5th day of November, 1904.

JOHN A. SHIELDS,
Clerk.



A copy.

JOHN A. SHIELDS,
Clerk.

Circuit Court of the United States

DISTRICT OF MARYLAND

NATIONAL BISCUIT COMPANY
Complainant,

vs.

HARGRAVE BISCUIT COMPANY, JOSEPH W.
HARGRAVE, WILLIAM B. HARGRAVE,
EPPS HARGRAVE, STEVEN J. VAN LILL
and JAMES W. CHAPMAN, Jr.,
Defendants.

IN EQUITY

FINAL DECREE AND INJUNCTION

OFFIELD, TOWLE & LINTHICUM
Solicitors for Complainant.

W. IRVINE CROSS
EARL D. BABST
Of Counsel for Complainant.

GEORGE D. PENNIMAN
JAMES W. CHAPMAN, JR.
Solicitors for Defendants.



FINAL DECREE.

UNITED STATES CIRCUIT COURT,

District of Maryland.

National Biscuit Company, <i>Complainant,</i>	}	
<i>vs.</i>		
Hargrave Biscuit Company, Joseph W. Hargrave, William B. Har- grave, Epps Hargrave, Steven J. Van Lill and James W. Chapman, Jr.	}	<i>Bill for infringement of trade-mark, trade- name and unfair competition.</i>
	}	<i>Defendants.</i>

This cause coming on to be heard upon the pleadings as filed, Mr. W. Irvine Cross, Earl D. Babst and Charles K. Offield appearing in behalf of the complainant, and Mr. George D. Penniman and James W. Chapman, Jr., in behalf of defendants.

And it appearing to the Court that said defendants do not desire further to contest or defend this action, and that said defendants have tendered and paid the costs to date in this action as taxed by the Clerk, and have also made settlement and paid damages and profits due the complainant by reason of the infringing acts set forth in the Bill of Complaint, and that no remaining question is open and present except the matter relating to the granting of an injunction.

It is therefore, this 19th day of October, 1905, ordered, adjudged and decreed that an injunction issue under and in accordance with the allegations of the Bill of Complaint and as identified by the prayer thereof, and that this decree and order be and is final.

THOS. J. MORRIS,
Judge.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, TO-WIT:

I, James W. Chew, Clerk of the United States Circuit Court for the District of Maryland, do hereby certify that the foregoing is a true copy of the Original Decree entered and filed in the therein entitled case in said Circuit Court, on the 19th day of October, 1905.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Circuit Court this 31st day of October, 1905.

JAS. W. CHEW,
Clerk of said Circuit Court.



INJUNCTION.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
DISTRICT OF MARYLAND.

THE UNITED STATES OF AMERICA,

To Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave, Steven J. Van Lill and James W. Chapman, Jr., and to your counselors, attorneys, solicitors, trustees, agents, clerks, employees, servants and workmen, and to each and every one of you, Greeting:

WHEREAS, it has been represented to the Judges of our Circuit Court of the United States for the District of Maryland in Chancery sitting, on the part of the National Biscuit Company, complainant, in a certain Bill of Complaint, exhibited in our said Circuit Court, on the Chancery side thereof, before the Judges of said Court, against you, the said Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave, Steven J. Van Lill and James W. Chapman, Jr., to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience.

And it being ordered that a writ of perpetual injunction issue out of said Court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Hargrave Biscuit Company, Joseph W. Hargrave, William B. Hargrave, Epps Hargrave, Steven J. Van Lill

and James W. Chapman, Jr., your counselors, attorneys, solicitors, trustees, agents, clerks, employes, servants and workmen, and each and every of you, that you

DO ABSOLUTELY DESIST AND REFRAIN FROM, in any manner whatsoever handling, advertising or selling packages or cartons containing bakery products having upon the ends thereof any red seal with white line markings thereon, or red seal substantially like the Seal or Trade-Mark of your orator; or from making, using, selling or handling cartons like your orator's carton containing your orator's Trade-Name "UNEEDA BISCUIT" with wrapper accompaniment as shown in your orator's exhibit of the same, of the use of the word "BISCUIT" upon a white parallelogram, as shown in "Complainant's Exhibit Defendants' Infringing Carton," whether preceded by the words "Eta Hargrave Biscuit" or any other words associated therewith, or from the use of any wrapper application similar to or substantially like the wrapper application upon your orator's "UNEEDA BISCUIT" package; and from violating and infringing the rights of your orator in the premises, until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Baltimore, in said District, this 19th day of October, in the year of our Lord, one thousand nine hundred and five and of our Independence, the one hundred and thirtieth year.

JAMES W. CHEW, Clerk.



UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, To-Wit:

I, James W. Chew, Clerk of the United States Circuit Court for the District of Maryland, DO HEREBY CERTIFY that the foregoing is a true copy of the Perpetual Injunction which was issued out of said Court in the case entitled National Biscuit Company vs. Hargrave Biscuit Company, *et al.*, in said Circuit Court on the 19th day of October, 1905.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Circuit Court this 31st day of October, 1905.

JAS. W. CHEW,
Clerk of said Circuit Court.



Circuit Court of the United States

EASTERN DISTRICT OF MICHIGAN

NATIONAL BISCUIT COMPANY	}	IN EQUITY No. 3898
<i>vs.</i>		
HAMMELL CRACKER COMPANY, and JAMES F. HAMMELL, SAMUEL DUMPHY and P. J. HAMMELL,		
<i>Complainant,</i> <i>Defendants</i>		

DECREE AND INJUNCTION

CHARLES K. OFFIELD
EARL D. BABST
Solicitors for Complainant.

THOMAS, CUMMINS & NICHOLS
Solicitors for Defendants.



FINAL DECREE.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit, on Friday the thirteenth day of October, in the year one thousand nine hundred and five.

Present: The Honorable Henry H. Swan, District Judge.

National Biscuit Company,	}	No. 3898.	
vs.			
Hammell Cracker Company, and			In Equity.
James F. Hammell, Samuel Dumphy and P. J. Hammell.			

This day came the above named complainant, the National Biscuit Company, by Mr. Earl D. Babst and Charles K. Offield, its Solicitors and of Counsel, and the defendants by Messrs. Thomas, Cummins & Nichols, their Solicitors and of Counsel, and it appearing to the Court that the defendants do not further desire to contest this action, and that they have settled with and paid to the complainant the damages, profits and costs arising out of this action and the acts complained of in the Bill of Complaint, and that there nothing remains as to this litigation, except as to the subject matter of injunction, and the entry of final decree so expressed herein, the defendant consenting thereto,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

First: That the complainant is the true, rightful originator and sole owner of a certain trade-mark, or symbol, consisting of a red end seal upon the ends of cartons or packages, containing bakery products, having a red background and white line markings thereon;

Second: That the defendants have infringed upon and violated the exclusive rights of the complainant by the use and application upon the ends of their cartons containing bakery products, of a red end seal with white line markings thereon;

Third: That the said defendants, Hammell Cracker Company, James F. Hammell, Samuel Dumphy and P. J. Hammell, and each of them, and their respective agents, servants, and employes, and each of them, be and hereby are perpetually enjoined from affixing, using or applying, or causing to be affixed, used or applied, in any way, upon cartons or the ends of cartons containing bakery products, any red seal with white line markings thereon, or from using or applying upon the ends of their cartons, containing bakery products, any seal in simulation or imitation of complainant's red end seal, or "In-er-seal" trade-mark;

Fourth: It further appearing to this Court that the said defendants have settled and paid the complainant the damages to complainant and profits to the defendants arising out of the infringing acts complained of, and also paid to the complainant the costs in this case, no reference to the Master for any purpose is therefore made in this case, and this decree as entered, is to be, and stand, as final.

UNITED STATES OF AMERICA, }
Eastern District of Michigan. } ss.

I, Walter S. Harsha, Clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of Final

Decree in the therein entitled cause as the same appears on file and of record in my office; that I have compared the same with the original and it is a true and correct transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said district, this 13th day of October, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America, the one hundred and thirtieth.

WALTER S. HARSHA, Clerk.

By ADELAIDE ANDERSON VORHEIS,
Deputy Clerk.



INJUNCTION.

UNITED STATES OF AMERICA:

THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN, IN EQUITY.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To Hammell Cracker Company, and James F. Hammell, Samuel Dumphy and P. J. Hammell, and to their counselors, attorneys, solicitors, trustees, agents and servants, and each and every of them, Greeting:

WHEREAS, It has been represented to us, in the Circuit Court of the United States for the Eastern District of Michigan, in Equity, on the part of the National Biscuit Company, Complainant, that it has lately exhibited a Bill of Complaint and Decree against you the said Hammell Cracker Company, and James F. Hammell, Samuel Dumphy and P. J. Hammell, Defendants, to be relieved, touching the matters therein complained of; in which bill and decree it is stated, among other things, that you are combining and confederating with others to injure the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we therefore, in consideration thereof, and of the particular matters in the said bill and decree set forth, do strictly command you, the said Hammell Cracker Company, and James F. Hammell, Samuel Dumphy and P. J. Hammell, and the persons before mentioned, and each and every of you, under the penalty of Ten Thousand Dollars, to be levied of your lands, goods, and chattels, to

our use, that you do absolutely desist and refrain from perpetually from affixing, using or applying or causing to be affixed, used or applied, in any way, upon cartons or the ends of cartons containing bakery products, any red seal with white line markings thereon, or from using or applying upon the ends of their cartons, containing bakery products, any seal in simulation, or imitation of, complainant's red end seal, or "In-er-seal" trade-mark, until the further order of this Court.

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this thirteenth day of October in the year of our Lord one thousand nine hundred and five and of the independence of the United States of America the one hundred and thirtieth.

WALTER S. HARSHA,
Clerk.

By ADELAIDE ANDERSON VOORHEIS,
Deputy Clerk.



UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF MICHIGAN. } ss.

I, Walter S. Harsha, Clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy

of Perpetual Injunction in the therein entitled cause as the same appears on file and of record in my office; that I have compared the same with the original and it is a true and correct transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said district, this 13th day of October, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and thirtieth.

WALTER S. HARSHA,

Clerk.

By ADELAIDE ANDERSON VOORHEIS,

Deputy Clerk.



Circuit Court of the United States

DISTRICT OF INDIANA

NATIONAL BISCUIT COMPANY <i>Complainant,</i>	}	IN EQUITY No. 10410
vs. ISAAC F. WHITESIDE, <i>Defendant.</i>		

DEMURRER AND ORDER
OVERRULING DEMURRER

OFFIELD, TOWLE & LINTHICUM
Solicitors for Complainant.

W. H. H. MILLER
CHARLES K. OFFIELD
EARL D. BABST

Of Counsel for Complainant.

HARVEY, PICKENS, COX & KAHN
Solicitors for Defendant.

KEALING & HUGG
BAKEWELL & CORNWALL

Of Counsel for Defendant.

the exclusive use of what is herein designated as complainant's "Uneeda" or "Uneeda Biscuit" trade-mark or trade-name.

5. That it does not appear from said bill of complaint, or from the exhibits referred to therein, that defendant has infringed any exclusive right of complainant in the "name Uneeda" or "Uneeda Biscuit."

6. That as to the things designated as "the nine remaining complainant's exhibits," referred to in paragraph sixteen of the bill, it does not appear from said bill—

(a) That the same are described in said bill with sufficient particularity for the defendant to answer in respect to the same;

(b) That it does not appear from said bill that complainant has any exclusive right with respect to any or all of said exhibits;

(c) That it does not appear from said bill, or from the exhibits referred to therein, that defendant has infringed, or is now infringing, any exclusive rights of complainant with respect to any or all of said exhibits.

7. That complainant has not in and by its bill of complaint shown that it is entitled to the sole and exclusive use of the form and arrangement and dress of the package referred to in paragraph "ninth" of the bill of complaint as "Complainant's Exhibit Carton Trade Name Uneeda Biscuit and Wrapper"; nor has complainant shown by its said bill that defendant has infringed, and is now infringing, any exclusive right of complainant in and to the same.

8. That it does not appear from the said bill of complaint that complainant is entitled to the exclusive use of the name "Jersey Butter" as applied to crackers or biscuits; nor does it appear from said bill that defendant has infringed, or that defendant is now infringing, any

exclusive right of complainant in the name "Jersey Butter" as applied to crackers or biscuit.

9. That it does not appear from said bill that complainant is entitled to the exclusive use of the figure of a cow stamped or marked on crackers; nor does it appear from the bill that defendant has infringed, or is now infringing, any exclusive right of complainant in respect to the figure of a cow stamped or marked on crackers or biscuit.

10. That it does not appear from the bill of complaint that complainant is entitled to the exclusive use of the word "Crisp" or "Crispy" as applied to crackers or biscuit; nor does it appear from said bill that defendant has infringed, or that defendant is now infringing, any exclusive right of complainant in and to the word "Crisp" or "Crispy" as a mark or name for crackers or biscuit.

11. That as to all of said bill which undertakes to claim infringement by defendant in respect to complainant's alleged cartons or packages referred to therein as "Complainant's Exhibits Cartons Baking Products, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11," "Complainant's Exhibit Complainant's Carton Trade Name Uneeda Biscuit and Wrapper," and "Complainant's Exhibit Complainant's In-cr-seal trade-mark," complainant is not in equity with clean hands and is not entitled to any equitable relief in this cause, as it appears from said exhibits, which are referred to in the bill and made part thereof by the allegations of the bill, as well as from matters of which this Court will take judicial notice, that as to each of said cartons it distinctly appears that the same (on the outer wrapper thereof) is now being represented by complainant as patented March 28, 1899 (which is the date of the Peters U. S. Patent No. 621,974 relating to cartons). Whereas, as appears from Volume 125 of the Federal Reporter, between pages 601

and 609 thereof (of which this Court will take judicial notice), on the 23rd day of November, 1903, the said Peters Patent for Carton was declared invalid by the United States Circuit Court of Appeals for the Eighth Circuit, on the ground that the same failed to disclose patentable novelty; and that it appears from the opinion, of the United States Circuit Court in said cause (120 Federal Reporter, between pages 679 and 687), which opinion of the United States Circuit Court was reversed by the United States Circuit Court of Appeals for the Eighth Circuit in the case reported in 125 Federal Reporter, *supra*, that the complainant in this cause, the National Biscuit Company, was, at the time said cause of *Peters vs. Union Biscuit Company* (reported in the Federal Reporter, volumes 120 and 125, *supra*) was pending and prior thereto, the exclusive licensee of Peters, the patentee of said patent No. 621,974, of March 28, 1899, so far as said patent might be used for packing bakery products. Therefore, it appears from the said bill of complaint, from complainant's exhibits above referred to, and from matters of which this Court will take judicial notice, that at the time of filing the bill in this cause and since the decision of the United States Circuit Court of Appeals for the Eighth Circuit, rendered November 23, 1903, in said cause of *Union Biscuit Company, appellant vs. Peters, appellee* (see 125 Federal Reporter, 601-609), that complainant is still holding out to the public that said exhibit cartons or packages are protected by said Peters' United States letters patent, dated March 28, 1899, whereas, at the time of filing this bill of complaint and said exhibits, and since about one year before the filing of the same, the said Peters' Patent of March 28, 1899, has been adjudged of no force and effect by the United States Circuit Court of Appeals for the Eighth Circuit, which opinion and the decree entered in pursuance

of the same is now, and was at the time of filing the bill of complaint herein, in full force and effect, as complainant well knew at the time of filing the bill of complaint herein.

12. That it appears from said bill and the exhibits filed therewith, as well as from matters of which this Court will take judicial notice, that this defendant has not infringed the alleged trade-marks, trade-names or wrappers of complainant, there not being such similarity between the alleged trade-marks, trade-names or wrappers of complainant and those of defendant, as shown by the exhibits filed in connection with complainant's bill, as would deceive an ordinary purchaser using reasonable care so that he would buy the goods of defendant believing them to be the goods of complainant.

13. That complainant has not in and by its said bill stated such a case as doth or ought to entitle it to any equitable relief by way of injunction as against defendant, it not appearing from said bill that at the time of filing the same this defendant was continuing to do the acts of which complaint is made as acts done in the past by this defendant, nor does it appear from said bill that defendant is threatening to do, or about to do, the alleged acts complained of as having been done by the defendant.

14. As to the allegations of fraud in the bill of complaint, they are immaterial, since it appears from the whole bill, and the exhibits filed therewith, notwithstanding the epithets as to fraud used therein, that—

- (a) Complainant has no standing in a court of equity;
- (b) Complainant has no exclusive rights which have been violated by defendant;
- (c) Said allegations of fraud, taken in connection with the bill and exhibits filed therewith, do not connect de-

defendant with any specific acts which make him responsible to complainant in this action.

15. That the bill fails to show such facts in regard to the use by defendant of any package, carton, trade-mark or wrapper as constitute unfair competition in trade on the part of defendant in respect to any article sold by complainant, in that it does not appear from said bill that any article made and sold by defendant has been sold, or is likely to be sold, to any one as and for the goods of the complainant.

16. That as to paragraph "fourteen" of the bill, it does not constitute any cause of action, nor does it constitute any inducement to any cause of action, since it does not appear therefrom that if defendant did employ persons formerly in the employment of complainant, he thereby did an unlawful thing, or anything the doing of which can be taken cognizance of by this Court in this action; it does not appear from the allegations of paragraph "fourteen" of the bill that the said former employees of complainant were not free agents, free to take employment with others when and where they might see fit.

17. Referring to paragraph "twentieth" of the bill of complaint, defendant demurs thereto on the ground that it does not appear from the allegations of the bill in that paragraph or elsewhere that complainant is entitled to the exclusive use of the certain metallic rack or holder therein referred to and marked "Complainant's Exhibit Complainant's Retail Grocer Carton Exhibit Rack;" nor does it appear from the bill of complaint that defendant has infringed any exclusive rights of the complainant in and to said rack or holder.

18. That notwithstanding the allegations of the bill of

complaint herein as to defendant having originally been engaged wholly in the manufacture of bread and afterwards engaged in the manufacture of crackers and biscuit, it does not appear that defendant, by reason of such fact, is liable to the complainant in this suit; since it does not appear from the allegations of the bill of complaint, nor could it be recognized in law as a sound principle if it do appear from the bill of complaint that complainant is entitled to the exclusive monopoly in the manufacture and sale of crackers and biscuit.

19. That as to the allegations contained in "twenty-fifth" and "twenty-sixth" paragraphs of the bill, the same constitute no cause of action, neither do they constitute any inducement to any cause of action, against this defendant, and are mere surplusage, for the following reasons:

(a) The defendant is not shown to be a party, nor is defendant shown to be in privity with any party, to any suit stated or referred to in either of said clauses of the bill;

(b) It appears from said decisions or decrees in all of said cases (if the Court chooses to refer to the same) that the facts in each and all of said cases are utterly and entirely different from the facts in the case presented by the bill in this case;

(c) That the question as to defendant's liability in this action is to be determined by the facts in this case; and, on this demurrer, it clearly appears that complainant has stated no cause of action, no matter whether or not, in other cases against different defendants, under totally different states of facts, complainant has been able to state and establish causes of action.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto and humbly demands the judgment of this Court whether

he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HARVEY, PICKENS, COX & KAHN,
Solicitors for Defendant.

KEALING & HUGG,
BAKEWELL & CORNWALL,
PAUL BAKEWELL,
Of Counsel for Defendant.

STATE OF MISSOURI, }
CITY OF ST. LOUIS. } ss.

Isaac F. Whiteside, being duly sworn, on his oath states that he is the defendant above named, and that the foregoing demurrer is not interposed for delay.

ISAAC F. WHITESIDE.

Sworn to and subscribed before me this 3rd day of February, 1905.

My Term expires 17th February, 1905.

GEORGE BAKEWELL,
Notary Public.

ORDER OVERRULING DEMURRER

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF INDIANA.

May Term, 1905.

June 17th, A. D. 1905.

Before the Honorable Albert B. Anderson, Judge.

National Biscuit Company }
vs. } No. 10,410 Chancery.
 Isaac F. Whiteside. }

Come now the parties by their respective solicitors, and thereupon the Court having heard the argument of Counsel and being sufficiently advised in the premises doth now overrule the demurrer to the bill of complaint herein.

And the defendant is ruled to answer by the first Monday of September next.

UNITED STATES OF AMERICA, }
 DISTRICT OF INDIANA. } ss.

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of an order entered in said court on the 17th day of

June, 1905, in the cause entitled National Biscuit Company vs. Isaac F. Whiteside, as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis in said District this 1st day of November, A. D. 1905.

NOBLE C. BUTLER,
Clerk.



INFRINGEMENTS ABANDONED
UNDER NOTICE, BUT
BEFORE SUIT

In addition to the foregoing the following infringements of trade-marks, trade-names, labels, wráppers and the equitable trade-rights of National Biscuit Company have been abandoned by various manufacturers under notice, but before suit:

In-er-seal Trade-mark	58
Uneda Biscuit	29
Red Label Graham	27
Ribbon-Tying Design	22
Mary Ann	22
Social Tea	13
Zu Zu	11
Lemon Snaps Label	6
Oysterettes	6
Jonnie	4
Faust	4
Saratoga Flake Label, Tid Bit, City Soda Label, Premium Biscuit, Saltine Label, etc., etc.	47
Total	249

NATIONAL BISCUIT COMPANY

EARL D. BABST,

NEW YORK, JANUARY 1906.

General Counsel

KF 3189 N27 A5 1906

Author	Vol.
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U. S. Courts	Copy
Title	
National biscuit company.	
Date	Borrower's Name

